Supreme Court, U.S.
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No. 02-808

In The
Supreme Court of the United States

RICHARD J. MARRA,

Petitioner,

v.

MARY V. LEFTRIDGE BYRD, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, CHESTER, PENNSYLVANIA; ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA; AND DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, PENNSYLVANIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Attorney for Petitioner

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QUESTIONS PRESENTED

1. Is evidence of a state crime insufficient under the Due Process Clause, as interpreted in *Jackson v. Virginia*, 443 U.S. 307 (1979), when the basis for affirmance approved by the state courts is properly found on federal habeas corpus review to be contrary to the record, and the federal court of appeals' analysis of the evidence, in conflict with that adopted by the district court on habeas, was never argued by the prosecutor to the jury at trial or on appeal in any court?

2. Under this Court's decision in *Castille v. Peoples*, 489 U.S. 346 (1989), does a state criminal defendant make a "fair presentation" of a federal issue in state court, thus exhausting remedies for federal habeas corpus purposes, where the issue was first raised in a petition for discretionary review to the state supreme court as required by the state courts' own procedural rules, and the record on the issue is later developed in the state trial court and appealed to the state's intermediate court, particularly where the state in question, following *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), has declared its discretionary review mechanism to be optional for exhaustion purposes?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Marra, and the three official respondents). The name of Mary V. Leftridge Byrd, Superintendent, the petitioner's current actual custodian, has been substituted under this Court's Rule 35.3 for that of David Larkins, in light of petitioner's recent transfer from SCI Dallas, of which Mr. Larkins is Superintendent, to SCI Chester, where Ms. Leftridge Byrd is Superintendent.

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PETITION FOR WRIT OF CERTIORARI

RICHARD J. MARRA respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed on May 21, 2002, affirming the denial by the U.S. District Court of his petition for a writ of habeas corpus.

OPINIONS BELOW

The Third Circuit's non-precedential Opinion (per Barry, J., with McKee, J.)[1] was filed May 21, 2002. It is available on-line at 2002 WL 1980413, and is published unofficially at 46 Fed.Appx. 83. A copy is reprinted at Appendix 1-21.[2] The district court's opinion is published as *Marra v. Larkins*, 111 F.Supp.2d 575 (E.D.Pa., filed August 16, 2000); *see* Appx. 22-46.

On direct appeal, the Superior Court of Pennsylvania affirmed by unpublished judgment and memorandum. *Commonwealth v. Marra*, 391 Pa.Super. 637, 563 A.2d 192 (May 26, 1989); Appx. 47-56. The state supreme court denied allowance of appeal; *see* 524 Pa. 626, 574 A.2d 68 (Dec. 20, 1989). State post-conviction review was denied in the trial court on October 8, 1992, and petitioner Marra

[1] As the memorandum recites, Judge Mansmann, who also sat on the panel, had joined the decision but had not approved the actual opinion prior to her untimely death.

[2] The version of the opinion initially posted on the Third Circuit's website was defective, as it lacked the footnotes. So did the version initially printed in the "Federal Appendix," 37 Fed.Appx. 29. The version reprinted in the Appendix and cited above is complete.

again appealed unsuccessfully to Superior Court. The decision is *Commonwealth v. Marra*, 434 Pa.Super. 691, 641 A.2d 1225 (Nov. 15, 1993) (mem.); Appx. 57-62. Following denial of reargument by the Superior Court, the state supreme court again denied allowance of appeal. 538 Pa. 656, 648 A.2d 787 (Aug. 24, 1994).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the district court's denial of petitioner Marra's application for a writ of habeas corpus was filed and entered on May 21, 2002. Appx. 1, 21. A timely petition for rehearing by the panel or en banc was denied by Order dated June 25, 2002. Appx. 63-64. On September 17, 2002, under Docket No. 02-A-238, Justice Souter granted an extension of time for the filing of this petition to and including November 22, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 2254 of title 28, United States Code, prior to its amendment by the Antiterrorism and Effective Death Penalty Act of 1996, provided in pertinent part:

> **§ 2254. State custody; remedies in Federal courts**
>
> * * *

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * *

28 U.S.C. § 2254 (1966 rev.)

Amendment XIV to the United States Constitution provides, in pertinent part, that "no State shall deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

This petition arises out of the district court's denial of a state prisoner's petition for a writ of habeas corpus and the affirmance of that denial by the court of appeals.

a. Course of Proceedings

Petitioner Richard Marra was convicted of murder in Pennsylvania in 1987, in violation of 18 Pa.Cons.Stat.

§ 2502(a), and sentenced to life imprisonment. The case arises out of the January 1986 shooting death of one Michael Ragno in a Philadelphia night club. At trial, the jury acquitted his co-defendants but convicted petitioner Marra.

1. The proceedings in state court

Represented by trial counsel, attorney Robert F. Simone, petitioner appealed his conviction, challenging the sufficiency of the evidence, among other issues. The Superior Court affirmed by unpublished judgment and memorandum. *Commonwealth v. Marra*, 391 Pa.Super. 637, 563 A.2d 192 (May 26, 1989); Appx. 47.

Represented by new counsel, Marra then petitioned the state supreme court for review, including among his issues the two federal issues of insufficient evidence, as well as ineffective assistance of attorney Simone. One of the instances of ineffective assistance[3] was Simone's conflict of interest in representing both Marra and Nicodemo Scarfo, the boss in crime of the other prime suspect in the Ragno murder, Philip Narducci.[4] (As discussed later

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[3] The other points are no longer involved in this case.

[4] It was not yet known at that time that Simone was not merely Scarfo's counsel, but also his co-conspirator, and thus at least "associated with" (18 U.S.C. § 1962(c)) the same racketeering enterprise as Narducci. That "enterprise" (*id.*) invokes a blood-oath loyalty and governs by fear of deadly violence. See *United States v. Pungitore*, 910 F.2d 1084, 1137-41 (3d Cir. 1990) (describing "Implication of Scarfo's Attorney [Simone] in Rouse Extortion"), *cert. denied*, 500 U.S. 915 (1991). Simone was disbarred after his federal conviction for conspiring during the exact time period of the Marra prosecution in an organized crime extortion plot. *United States v. DiSalvo*, 34 F.3d 1204 (3d Cir.

(Continued on following page)

in this petition, state law requires allegations of ineffective assistance of counsel to be raised at the first available opportunity after the defendant is represented by different counsel.) The appeal, however, was not allowed; that is, discretionary review was denied. 524 Pa. 626, 574 A.2d 68 (Dec. 20, 1989).

Represented by another attorney, Marra filed a petition in state court for post-conviction relief ("PCRA"). A number of instances of ineffective assistance were advanced, including attorney Simone's conflict of interest. Disregarding the problem of conflict of interest, the trial court viewed the matter simply as one of "trial strategy" and denied the PCRA petition. CA3 App. 178.

Denial of the PCRA petition on October 8, 1992, was appealed unsuccessfully to Superior Court. See *Commonwealth v. Marra*, 434 Pa.Super. 691, 641 A.2d 1225 (Nov. 15, 1993) (mem.); Appx. 57. The issue of Simone's ineffective assistance at trial for failing to present available evidence of Narducci's guilt as the actual killer was pursued in that appeal, including a reference to the evidence of a conflict of interest, but the conflict was not separately presented as an issue. *See* Appx. 15-17. Following denial of reargument by the Superior Court, the state supreme court again denied allowance of appeal. 538 Pa. 656, 648 A.2d 787 (Aug. 24, 1994). The supreme court petition primarily focused on counsel's failure to present character witnesses. It also included the issue of Simone's ineffectiveness, but did not mention the conflict of interest.

1994) (affirming Simone's conviction); *Office of Disciplinary Counsel v. Simone*, 653 A.2d 1210 (Pa. 1995) (disbarment).

2. The federal habeas corpus proceedings

Petitioner Marra filed a counseled petition for federal habeas corpus relief in March 1996. CA3 App. 56.[5] Two of the issues raised were: (1) the evidence presented at trial, viewed in the light most favorable to the prosecution, was constitutionally insufficient to establish guilt beyond a reasonable doubt; and (2) trial counsel, attorney Simone, labored under an actual conflict of interest, in violation of Marra's constitutional right to the effective assistance counsel, due to Simone's loyalty to Mafia boss Nicodemo Scarfo, for whom the alternate suspect in this murder, Narducci (unlike Marra), was an enrolled underling,[6] and to Simone's informal representation of Narducci himself. CA3 App. 61-102.

After lengthy proceedings, including two remands to the Magistrate Judge, Senior U.S. District Judge Louis H. Pollak by memorandum dated August 15, 2000, approved and adopted the latest report (Appx. 29-46) and denied the petition. However, he granted a certificate to allow the appeal. Appx. 22-29, published as *Marra v. Larkins*, 111 F.Supp.2d 575 (E.D.Pa.).

On appeal, a Third Circuit panel affirmed, with a 21-page, non-precedential Opinion. Appx. 1-21. The opinion upholds the sufficiency of the evidence to prove petitioner's identity as the shooter in this murder case on an analysis

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[5] Accordingly, the substantive standards of the AEDPA (effective April 24, 1996) do not apply to this case, although its appellate procedural rules do apply. *Slack v. McDaniel*, 529 U.S. 473, 481-82 (2000); *Lindh v. Murphy*, 521 U.S. 320 (1997).

[6] See *United States v. Pungitore*, 910 F.2d 1084, 1099-1100 (3d Cir. 1990), *cert. denied*, 500 U.S. 915 (1991).

of the record different from any previously suggested by the district attorney or by any state (or lower federal) court to have reviewed the case. Appx. 4-8. In addition, the panel ruled that petitioner did not fairly present the issue of attorney Simone's blatant conflict of interest in this case to the highest court of Pennsylvania, and thus did not exhaust state remedies, even though his new attorney presented the issue to that court at precisely the time, and in precisely the manner, required by the rulings of that court itself as an exception to the general rule that issues must first have been raised below. Appx. 11-20.

A timely petition for rehearing by the panel or in banc was denied. Appx. 63-64. This petition follows.

b. Statement of Facts

1. The Underlying Case. Late on the night of January 12 or in the early morning hours of January 13, 1986, in a dark and crowded room on the second floor of Flanigan's, a night club-bar on South Street in Philadelphia, a group of three men confronted Michael Ragno, and one of the three shot and killed him. Petitioner Richard Marra was one of many individuals who were present on the second floor of Flanigan's that night. The District Attorney sought to prove that the killers were Mr. Marra and two companions. The jury acquitted the other two defendants, but convicted petitioner Marra. Defense counsel Robert F. Simone suggested to the jury that the actual killer was one Philip Narducci, who had also been present at the scene. Yet at the same time, counsel failed to bolster Marra's defense theory with evidence of self-incriminating statements made by Narducci which were in trial counsel's possession. *See* CA3 App. 162-70 (police

reports containing these statements).[7] The evidence is detailed further in connection with the second reason for granting a writ of certiorari.

2. Defense Counsel's Conflict of Interest. Simone testified at an evidentiary hearing held in March 1992 in connection with petitioner Marra's PCRA application. Simone conceded that he had not presented all available evidence pointing to Philip Narducci's guilt as the actual killer of Michael Ragno. CA3 App. 998-99. Simone admitted that he had a personal and professional relationship with Narducci, by virtue of which he "tried to look out for [Narducci's] interests as much as I could." CA3 App. 1010.[8] As Narducci was an alternate suspect in the same killing, Simone recognized that he could not represent both Narducci and Marra in the matter. Yet he failed to perceive during the course of his representation that for the same reasons he could not represent Marra at all. CA3 App. 1012. In retrospect, reconsidering his actions as Marra's trial counsel, Simone testified: "But was I wearing two hats during the trial? . . . I guess, looking at it now, you could say that." CA3 App. 1012-13.

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[7] At trial, witness Karen Antonelli said she was at Flanigan's second floor bar talking with Narducci at the time of the shooting, and that they then left together, thus giving Narducci an alibi. CA3 App. 367-68. Yet Simone failed to cross-examine Antonelli with her grand jury testimony and statement to the police saying she had been talking with a different friend, CA3 App. 197-98, and that she did not know where Narducci came from when she saw him while leaving. CA3 App. 178.20.

[8] In fact, as it later turned out, Simone also had a *criminal* relationship with Narducci. *See* notes 4 and 6 *ante*.

Reflecting further on the record of the trial, Simone acknowledged that even though he suggested Narducci to the jury as the actual killer, he "didn't go a hundred percent with it. That's the way it seems." CA3 App. 1051. On response to the assistant district attorney's cross-examination designed to rehabilitate him, Simone even described his own explanation for not having used all the available evidence as a "rationalization." CA3 App. 1021.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction under 28 U.S.C. §§ 2241(c) and 2254(a). The jurisdiction of the court below was properly invoked under 28 U.S.C. § 1291 and 28 U.S.C. § 2253.

REASONS FOR GRANTING THE WRIT

1. The decision below misapplies this Court's precedent in holding that the presentation of a federal issue to the Pennsylvania supreme court in the manner required by that court's own decisions nevertheless does not constitute a "fair presentation" of the issue for purposes of applying the federal habeas corpus doctrine of exhaustion of remedies.

The Third Circuit ruled that it is not "fair" to the Pennsylvania supreme court for a litigant to rely on that court's own rules in presenting a federal issue (ineffective assistance of prior counsel), because those rules do not allow the state court a "fair opportunity" to do its job right.

This ruling has the effect of turning on their head the deferential principles of comity which inform federal habeas corpus review. The Court should grant certiorari to clarify and correct this grave misapplication of the Court's precedents.

The opinion of the court below glosses over this most critical reason why the district court erred in finding a procedural default of petitioner's conflict/ineffectiveness claim. Under the circumstances of this case, the issue of attorney Simone's egregious conflict of interest was "fairly presented" to the state supreme court in Marra's "allocatur" petition (petition for allowance of appeal to the Pennsylvania state supreme court) on direct appeal. Relying on the general rule that new issues are not properly raised for the first time in a petition for allowance of appeal, the court below held that the ineffective assistance claim of attorney Simone's conflict of interest had not been exhausted and was thus procedurally defaulted. Appx. 11-20. This treats as "unfair" to the state the petitioner's adherence to the state court's own rules. The Court should consider whether the court below misconstrued the concept of "fair presentation" employed by this Court in its exhaustion-of-remedies jurisprudence.

It was on the petition for allowance of appeal ("allocatur") in the Supreme Court of Pennsylvania, in the course of his direct appeal, that petitioner Marra was first represented by counsel different from Simone. New counsel was thus *required* by Pennsylvania's appellate jurisprudence to raise Marra's claims of prior counsel's ineffectiveness in that forum and at that time. The Pennsylvania rule requiring ineffective assistance claims to be presented in the first filing by different counsel is fully applicable in the state supreme court itself. See *Commonwealth v. Green*,

551 Pa. 88, 709 A.2d 382, 384 (1998) (ineffective assistance of prior appellate counsel properly raised by new counsel in state supreme court). Indeed, this very holding appears in the leading case on the point. *Commonwealth v. Hubbard*, 472 Pa. 259, 372 A.2d 687, 695 n.7 (1977). The Third Circuit opinion makes clear its disapproval of this rule in terms of its effectiveness and practicality, particularly because it may not result in the making of a sufficient record. Appx. 17-20. Pennsylvania may some day change that rule, see Appx. 18 n.12, but in 1989 it was the procedure that the state supreme court demanded defendants follow. It therefore cannot have been "unfair" of Marra's new counsel to do so, and then to rely on the result.

The suggestion that only in the trial court (the Court of Common Pleas of Philadelphia County) can an evidentiary record be developed, Appx. 18-20, misses the mark. Petitioner did not "overlook" this point. Appx. 18. Evidentiary support can and indeed must be attached to the appellate filing by new counsel in these circumstances, with a request for remand for a hearing if appropriate. See *Commonwealth v. Pettus*, 492 Pa. 558, 563-64, 424 A.2d 1332, 1335 (1981); *Commonwealth v. Forest*, 629 A.2d 1032 (Pa.Super. 1993) (mandatory for new counsel to raise, in as much detail as possible and at the earliest possible opportunity, the ineffective assistance of prior counsel).[9] The

[9] Of course, the proceeding at which new counsel is expected to raise prior counsel's ineffectiveness must be an "appropriate" stage of the case; the question need not be raised at a hearing convened to consider a different, specific issue, and new counsel need not "undertake extraordinary measures to *create* an opportunity to raise the issue of effective assistance of prior counsel." *Commonwealth v. Pizzo*, 529 Pa. 155, 602 A.2d 823, 824 (1992) (emphasis original).

Pennsylvania supreme court could have remanded the matter for a hearing if it needed more facts but chose not to. Once the evidence has been presented to the state's highest court in the manner prescribed by its own rules, it is permissible but not mandatory to use the state's Post-Conviction Relief Act ("PCRA") mechanism to develop the record further before filing in federal court. See *Castille v. Peoples*, 489 U.S. 346, 350 (1989).

The court below thus appears to disregard the most pertinent feature of Pennsylvania procedure in relying on the inapposite *Peoples* decision. In that case, one of the two new issues raised for the first time on allocatur did not involve the ineffective assistance of prior counsel. *Id.* at 347-48. The Third Circuit did not explain how the mode of first presentation of an issue which is required under state law could be other than "a *fair* opportunity [for the state court] to act" within the meaning of *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (emphasis original). A "fair opportunity" to act upon the federal claim requires that the same claim have been presented to the state courts. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). It also requires that the facts have been developed. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The ordinary requirement of "one complete round" of exhaustion, Appx. 18 (quoting *O'Sullivan*, 526 U.S. at 845), must give way to the state court's own demand that the issue of prior counsel's ineffectiveness *not* be withheld until it can be presented in a *nisi prius* forum. Here, petitioner even presented his claim at each of the three levels of the state court system, just not in bottom-to-top order.

Admittedly, Pennsylvania's *Hubbard/Green/Pettus* rule is contrary to analogous federal procedure, see *United States v. DeRewel*, 10 F.3d 100, 103 (3d Cir. 1993), and

seems odd to a federal practitioner.[10] Yet that is (and more important, in 1989 it was), the law in Pennsylvania. The Commonwealth even had a "full and fair" opportunity to develop the facts, because petitioner did not go from there to federal court but instead initiated a PCRA proceeding and presented evidence of the conflict of interest at an evidentiary hearing. He even took an appeal from the PCRA denial to the state's intermediate Superior Court. The only step he failed to take was to include the conflict claim a *second* time in his final petition for allowance of appeal. As the ineffectiveness issue concerning attorney Simone's conflict of interest was raised in the first petition for allowance of appeal pursuant to the state court's own exception to its rule requiring questions to have been raised below, no further exhaustion was required to satisfy 28 U.S.C. § 2254(b-c) (pre-1996 vers.). It cannot be "unfair" to the State to comply with its own rules and procedures.

It is particularly ironic that the court below should have found a lack of exhaustion of remedies, leading to a procedural default of the conflict claim, based on petitioner's failure to petition a second time for allowance of appeal. Although the exhaustion doctrine exists to ensure federal court respect for the state courts' independent obligation to enforce federally-protected rights, Pennsylvania does not choose to have its discretionary review procedure pressured in that way. Following the announcement by this Court of the decision in *O'Sullivan*,

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[10] This Court has granted certiorari this Term to consider whether ineffective assistance of trial counsel *ever* need be raised by new appellate counsel on direct appeal in a federal criminal case. See *Massaro v. United States*, No. 01-1559 (granted Oct. 1, 2002).

the Pennsylvania supreme court announced that, so far as it was concerned, petitioning for allowance of appeal should not be deemed necessary to accomplish exhaustion of state remedies. *In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Jud.Admin.Dkt. No. 1 (Pa.S.Ct., May 9, 2000).[11] In *Wenger v. Frank*, 266 F.3d 218 (3d Cir. 2001), the Third Circuit held that this state court pronouncement does not apply retroactively to cases in which the time to petition for allowance of appeal expired prior to May 9, 2000, as in the present case. Nevertheless, the court below rendered a dubious ruling to ensure comity, where the public policy of the Commonwealth itself is not to require or encourage the inclusion of claims in allocatur petitions solely for the purpose of establishing prior exhaustion of remedies.

For these reasons, the Court should grant certiorari and reverse the judgment and decision of the court below.

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[11] That order reads, in pertinent part: "Further, we hereby recognize that criminal and post-conviction relief litigants have petitioned and do routinely petition this Court for allowance of appeal upon the Superior Court's denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus relief. [¶] In recognition of the above, we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been presented to the Superior Court, or to the Supreme Court of Pennsylvania, and relief has been denied in a final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal habeas corpus relief."

2. The principles protected by the constitutional sufficiency-of-evidence test enunciated in *Jackson v. Virginia* do not support a federal court in articulating a new and different theory to replace that offered in the state court, after that theory has been debunked and shown not to be supported by any rational view of the record.

Petitioner's challenges to his murder conviction have produced a series of decisions upholding the sufficiency of the evidence, no two of which are consistent in their assessments of what the jury might have found on the core question of whether petitioner was or was not the killer. The decision of the court below finds the evidence supporting petitioner Marra's 1987 Philadelphia conviction for first degree murder to be sufficient under the due process clause on an exegesis of the record that the prosecutor never suggested to the jury, that the District Attorney's Office did not argue on appeal in state court, that Judge Pollak did not discern in the district court, and which the respondents' able counsel did not adduce in their brief to the Third Circuit or at argument. This Court should grant certiorari to consider whether *Jackson v. Virginia*, 443 U.S. 307 (1979), requires the federal court to bend so far over backwards to defend a questionable conviction, to the point of disputing the state courts' own assessment of the record.

In *Jackson*, this Court held that a federal habeas corpus "applicant is entitled to relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. at 324. This standard "does not require scrutiny of the reasoning process actually used by the factfinder – if known." *Id.* at 319 n.13. But it does

co-exist with 28 U.S.C. § 2254(d) by deferring to the state courts' primary role in reviewing criminal convictions. *Id.* at 323. In this case, both the district court and the court of appeals concluded that the record evidence, as analyzed by the state courts, did not support the verdict. Instead, they scrutinized the details of the trial record to conjure up a novel theory of guilt. This exercise was both inappropriate and unavailing.

The evidence presented at trial was insufficient to prove beyond a reasonable doubt that petitioner Marra was in fact the murderer, and no rational jury could have found otherwise. The shooting occurred in the dark, second-floor bar area of Flanigan's, a night club on South Street in Philadelphia. Two witnesses reported remarks by Marra earlier that evening that could be construed as threatening to the victim. CA3 App. 222-23, 487-88. Marra then hurriedly left the club, CA3 App. 223, 488, only to return later in a calmer mood. CA3 App. 603-05.

Susan Murray testified that sometime after midnight she observed the victim, Michael Ragno, whom she had met earlier that evening at another club, CA3 App. 253, being approached by three men, as Ragno walked backwards away from Murray toward the men's restroom. CA3 App. 259-61. Murray looked away for an instant to express concern to a friend. CA3 App. 261. When she turned back around she saw the middle one of the three men "raise his hand and he had a gun in his hand." She heard a loud noise and saw a flash. CA3 App. 262. Murray went over to the victim and saw that he had been shot. She asked the bartender to "do something," but he responded only that she should "shut up and get out" of there. CA3 App. 262. In her trial testimony, Murray did not identify any member of this group of three. CA3 App. 271-72. (The state

court's affirmance on direct appeal is predicated on a misrepresentation of the record as showing the contrary. *See* Appx. 49, 54.)

Karen Antonelli, who was also at the bar, testified she heard a noise she believed to be a gunshot. CA3 App. 363, 371. She turned toward the noise and saw petitioner Marra and his co-defendants, she said, whom she knew. She testified that she did not see a body lying in front of them (nor behind). She also confirmed that her view was unobstructed. CA3 App. 378-79. She adhered to this testimony in the face of vigorous re-direct by the prosecutor. CA3 App. 386-90. Yet the court below, to uphold the conviction, would have it that the jury believed Antonelli simply overlooked a bleeding body behind the three men she saw. Appx. 7. The prosecutor never suggested this to the jury (in fact, he contended the opposite, albeit in contradiction to the actual evidence), nor did respondents argue that theoretical possibility on appeal or in the habeas corpus proceedings.

Murray testified she saw the middle one of a group of three men commit the murder, holding a gun. CA3 App. 262-63. These men had *their backs* to her. CA3 App. 259-61. Antonelli, who turned and looked in the same direction when she heard the shot, saw a group of three men *from the front*, CA3 App. 377-78, with petitioner in the middle, and did not see any gun. CA3 App. 364-65. Neither the district court nor court below explains how a reasonable jury could have concluded that these were the same group of three men.

Both witnesses were shown photographs by defense counsel and asked to mark their positions and indicate with arrows the direction in which they were looking. CA3 App. 326-34, 337-38, 344-46 (Murray); *id.* 376-77

(Antonelli). Susan Murray looked at photo D-11 and marked the initials MR on that picture where she saw the victim, Michael Ragno, when he was shot. CA3 App. 344-46. The prosecutor's next witness, Antonelli, was shown the same photo D-11 (already bearing Murray's MR marking) and was asked to indicate where she saw petitioner and his companions standing when she turned in response to hearing the gunshot. She replied that her own position was within the scene depicted in D-11, but the spot where she saw Marra was not shown in that photo at all. CA3 App. 376-77. The combined import of the Murray and Antonelli testimony is therefore that the men Antonelli saw, including petitioner Marra, were not the killers, because they were not in the same immediate area as where the victim's body lay. The Third Circuit opinion does not mention this essential part of the Commonwealth's evidence, nor attempt to explain what a rational factfinder might have made of it.

Murray estimated the total number of people on the second floor to have been 15 to 20. CA3 App. 274. She also testified that there were several groups of two or three men on the second floor that night. CA3 App. 265. Karen Antonelli, agreeing with Murray in this respect, testified that there were several groups of two, three, and four men on the second floor at the time of the shooting. CA3 App. 374. The court below, to support its theory, had to presume the jury might have found against the observations of both eyewitnesses. Contrary to the panel's *reductio*, Appx. 5 n.2, no reasonable jury could have understood Murray to mean that there were no more than "five other potential shooters," *id.*, mathematically "proving" that Murray and Antonelli saw the same men. The focus of *Jackson v. Virginia* is on what a presumptively "rational" factfinder could believe, not on how a witness's cautious approximations

can be squeezed into an unrealistic straitjacket of certainty.

Murray described the bar as having "a triangle shape with the point of a triangle pointing towards the stairs." She went on to state that she "was standing on the side of the bar closest to the bathrooms . . . close to the point of the bar." CA3 App. 290-91; see also *id.* 274. On re-cross-examination, Murray clarified that the three men who confronted Ragno forced him through the lounge area to the right (that is, easterly) of the restroom corridor. CA3 App. 330-32. For the killer (and his two buddies) to then turn and run toward the stairs would be either nearly a 180° turn to their right, or more than a 180° rotation counterclockwise, to their left and around.

Antonelli said she was standing "at" the bar, CA3 App. 367, that is, that she was "facing the bar" when she heard the shot. CA3 App. 378. She agreed that the shot was behind her. CA3 App. 379. This testimony necessarily places Antonelli, like Murray, along the side of the bar closer to the shooting. Upon hearing the shot, Antonelli testified, she turned "around" (CA3 App. 364) 90° to the right, in the direction of the noise (CA3 App. 378), at which point she saw her semicircle of three men facing her. (Of course if the shot was truly "behind" her (CA3 App. 379) she should have turned 180° to see the shooters, not 90°.) If Antonelli was standing to the right of the point, like Murray, facing the bar, and turned 90° right, as she carefully said (counsel had just demonstrated for her the differences between 360°, 270°, 110° [sic] and 90°, CA3 App. 378), she would have then been facing either the corridor to the rest rooms or the wall by the corridor, as the police schematic shows. Even if (contrary to her express testimony) she turned 180°, she still could not have seen the same three men as Murray, if she saw those

men in a semicircle and facing her. That could only have occurred if Murray's three had maintained their lineup position (with the shooter staying carefully in the middle), and then simultaneously paused, while turning toward the bar, halfway round the long way (*i.e.*, more than 220°) to get to the stairs. The Third Circuit's cavalier suggestion that "Marra could well have turned around," Appx. 7, does not begin to confront the evidence.

The possibility that all three of the perpetrators, with petitioner Marra in the middle, simultaneously turned 90° or more to the left, away from the stairs, to face Antonelli (after one of them shot Ragno), and then turned either back or the rest of the way around to flee, is remote at best, but most important is not described by any witness.[12] Neither Murray nor Antonelli saw a trio of whirling dervishes, so far as their testimony shows. If the killer and his friends were spinning like tops, the eyewitnesses would surely have noticed and would have told the jury about this peculiar and obviously memorable phenomenon. Since the record contains no mention of this, however, it follows that the Third Circuit's novel theory of sufficiency is speculation at best, not a fact-based interpretation of the actual evidence that a rational jury could have believed beyond a reasonable doubt, as required to satisfy due process under *Jackson*. The applicable federal standard of review is highly deferential to the jury's prerogatives. But federal habeas corpus review is rational, it need

[12] Perhaps Antonelli thought she was turning toward the noise when she saw petitioner Marra in the middle of a group of three men, but as often happens she misjudged the directional source of the sound in a crowded, dark and noisy barroom, and turned somewhat the wrong way. If so, then she may well have seen petitioner Marra, as she said, but she could not have seen the shooter and killer of Michael Ragno.

not "defer" to the point of tolerating totally fanciful theories, particularly where neither the trial prosecutor nor the state appellate courts have ever proposed those factual scenarios.

The opinion of the court below could create the impression that after the shooting only Marra ran from the bar. Appx. 6 ("Marra fled the scene"). If that were so, it would be circumstantially incriminating. The evidence was to the contrary, however; that's what everyone did. Antonelli testified that she and her companions immediately ran out of the bar, as did many if not most of the patrons. The doorman never testified that he saw a gun in Marra's hand, only that his "gut reaction," CA3 App. 499, led him to believe there was a gun in Marra's pocket.[13]

The foregoing explication of the trial record does not "suffer[ ] from a failure to construe the evidence in the light most favorable to the prosecution" or "couch[ ] the evidence in the light most favorable to [petitioner]," as the court below charged. Appx. 6. Rather, it considers all the evidence, without conveniently ignoring those parts, even where uncontested by the prosecution at trial, which are irreconcilable with guilt. As Judge Pollak firmly pointed out, and the court of appeals did not dispute, unless the eyewitnesses, Murray and Antonelli, were looking at the same three men, then the evidence is constitutionally

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[13] Doorman Mulholland, who followed petitioner outside, went on to testify that the person he believed to be Marra fumbled with keys before getting into the driver's side of the car. CA3 App. 495-96. The obvious inference is that Mulholland's fear-induced speculation was erroneous: petitioner's hand was not in his pocket so as to conceal a gun, but rather it was digging for his car keys while he, like many others, ran from the club.

insufficient. Appx. 25-26. Until responding to the habeas appeal in the court below, the District Attorney's Office had always claimed (in jury argument, on appeal, and in the district court), based on their (mis)reading of Antonelli's answer to a confusing grand jury question, as placed before her during re-direct (see Appx. 8-9), that Antonelli saw the body of Michael Ragno lying at Marra's feet. Judge Pollak determined that this is *not* what Antonelli said, Appx. 38 (notwithstanding his obedience to the duty of deference under former 28 U.S.C. § 2254(d)), and the respondents finally conceded in the court below that the principal basis of the Commonwealth's argument at trial and the affirmances in state court was fallacious. Comw. Br. 12.

The purpose of *Jackson v. Virginia* "no rational trier of fact" review is to protect state court defendants' due process rights while simultaneously respecting the prerogatives of the state court factfinding process, especially that of the jury. It does not follow that the federal court, consistent with the doctrine, can or should search for a theory of sufficiency which is essentially different from that which was ever presented to the state courts or argued to the jury. Such an approach overrides rather than defers to the state court's function. The conviction of petitioner Richard Marra for the murder of Michael Ragno thus violated the due process clause of the Fourteenth Amendment, as interpreted in *Jackson v. Virginia*. This Court should grant certiorari to review the approach of the court below to the question of sufficiency in this case.

CONCLUSION

Each of the issues raised in this petition justifies issuance of a writ of certiorari. The Third Circuit's resolution of these issues ironically places the federal habeas corpus court in the position of supporting the state court judgment by rejecting the state courts' reasoning and the state's own rules of practice. For the foregoing reasons, petitioner RICHARD MARRA prays that this Court grant his petition for a writ of certiorari, and reverse the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Attorneys for Petitioner

November 22, 2002.

APPENDIX

46 Fed.Appx. 83

NOT PRECEDENTIAL

United States Court of Appeals,
Third Circuit.

Richard J. MARRA, Appellant,
v.
David LARKINS, Superintendent, Dallas SCI;
District Attorney for the Philadelphia County;
the Attorney General of the State of Pennsylvania.

No. 00-2737.

Argued Feb. 11, 2002.
Decided May 21, 2002.

On Appeal from the United States District Court for the Eastern District of Pennsylvania. D.C. Civil No. 96-cv-02375. District Judge: The Honorable Louis H. Pollak.

Peter Goldberger, (Argued), Law Office of Peter Goldberger, Admore, PA, for Appellant.

David C. Glebe, (Argued), Thomas W. Dolgenos, Office of the District Attorney, Philadelphia, PA, for Appellees.

Before MANSMANN,* McKEE, and BARRY, Circuit Judges.

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* The Honorable Carol Los Mansmann participated in the oral argument and decision in this case, but died before she could join or concur in this Opinion.

OPINION

BARRY, Circuit Judge.

This case involves a 28 U.S.C. § 2254 habeas corpus petition filed by Richard Marra, who was convicted of first-degree murder on September 28, 1987 and sentenced to life imprisonment. The District Court denied Marra's petition on August 15, 2000. *Marra v. Larkins,* 111 F.Supp.2d 575 (E.D.Pa.2000). We have jurisdiction pursuant to 28 U.S.C. §§ 1291 & 2253, and will affirm.

I.

The factual background of this case is fairly straightforward. In the early hours of January 13, 1986, 24-year old Michael Ragno was fatally shot in the head at point blank range on the second floor of Flanigan's, a Philadelphia night club. It is undisputed that Marra argued with and threatened Ragno at the club entrance because Ragno came to the aid of a friend who said "hi" to Marra's girlfriend.

Approximately an hour after the confrontation, Ragno was murdered. While the precise circumstances of the murder are hotly contested, an eye witness testified that three men backed Ragno up against a wall on the second floor of Flanigan's, and that the man in the middle of these three antagonists shot and killed Ragno. Another eye witness identified Marra as the man in the middle of a group of three at that location immediately after the gun shot sounded. Following the shooting, Marra was seen fleeing the club while concealing a dark object in or about his waistband. He was then seen getting into his car and leaving the scene. Just hours later, the police found Marra's car deliberately destroyed by fire.

Marra was tried along with two co-defendants, Jeffrey M. DiOrio and Louis A. Deangelo, Jr., before a Philadelphia County Court of Common Pleas jury. On September 29, 1987, the jury convicted Marra of first-degree murder and a related weapons charge, but acquitted his co-defendants. Marra was sentenced to life imprisonment.

On March 22, 1996, after pursuing his state court appeals, Marra filed this habeas petition. The Magistrate Judge recommended denial of the petition, apparently without having had access to the trial record because it had been mislaid. The District Court denied the petition, but subsequently vacated its denial of Marra's motion for reconsideration when the trial record was produced. The Magistrate Judge recommended denial of the renewed motion for reconsideration, and the District Court adopted that recommendation in an Opinion and Order filed August 6, 2000.

On appeal, Marra contends that (a) the evidence presented was insufficient to prove guilt beyond a reasonable doubt, (b) the trial court denied him due process by reading back only a portion of testimony in response to a note submitted by the jury during deliberations, and (c) the District Court erred in finding his ineffective assistance of counsel claim because of a conflict of interest to be procedurally barred.

II.

Before turning to the merits, we note that this habeas petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Accordingly, the AEDPA is inapplicable. Where, as here, the

District Court based its decision on the record of the state court proceedings, our review of that decision is plenary. *Bey v. Morton,* 124 F.3d 524, 528 (3d Cir.1997); *Johnson v. Rosemeyer,* 117 F.3d 104, 109 (3d Cir.1997); *Jackson v. Byrd,* 105 F.3d 145, 147 (3d Cir.1997).

A. *Sufficiency of the Evidence*

It is well-settled that a sufficiency of the evidence challenge requires us to view the evidence and all reasonable inferences therefrom in the light most favorable to the prosecution and determine whether any rational jury could have found guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Jackson,* 105 F.3d at 148. Applying this standard, the District Court concluded that the "evidence was sufficient – even if only by a narrow margin." *Marra,* 111 F.Supp.2d at 578.

Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have found the following:

Marra and Ragno had a brief altercation at the club entrance when Marra accosted Ragno's friend for saying "hi" to Marra's girlfriend. During this exchange, Marra implicitly if not explicitly threatened Ragno with physical harm when he said "you don't know who I am," "you don't

know who you are f[-]king with," and "you'll see who I am." Marra then ran from the club, but later returned.[1]

Approximately an hour later, Ragno and Susan Murray were conversing on the second floor of the club. Marra was also on the second floor at this point. Ragno excused himself to go to the men's room when he was confronted by three men who proceeded to back him towards a wall. Murray witnessed the man in the middle of this group shoot and kill Ragno at point blank range, but she could not see the faces of the three men as their backs were to her. There were no other threesomes near Ragno at this time.[2] Murray turned to alert the bartender, and consequently did not see what the killer did immediately

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[1] Given the subsequent events, the jury might have reasonably inferred that Marra left the club to get a gun. Marra attempts to diminish the significance of the altercation by pointing to evidence suggesting that he returned to the club in a "calm" mood. This, however, cuts both ways. To the extent Marra returned in a "calm" mood, the jury could reasonably have perceived him to be a cold blooded killer.

[2] Murray testified that there were approximately 15-20 people on the second floor at the time of the murder with several groups of three or more but only one such group near Ragno. Marra argues that Murray's statement that there were other groups of men on the second floor precluded the jury's verdict. This argument not only overlooks Murray's testimony that there was only one group of three near Ragno, but improperly views the evidence in the light most favorable to Marra. Viewing the evidence in the light most favorable to the prosecution, the jury could reasonably have found that there were 15 people on the second floor at the time of the murder. Subtracting Murray, Ragno, the three co-defendants, and witness Karen Antonelli, there were nine. Murray's girlfriend and the bartender could also be subtracted, leaving seven. Antonelli's two companions were also at the bar at the moment in question, leaving only five other potential shooters (assuming that all five remaining candidates were male). There was virtually no possibility of another group of three men.

thereafter. Seconds later, however, Karen Antonelli turned in the direction of the gun shot and saw Marra standing between his two co-defendants.[3] Murray's and Antonelli's testimony, coupled with the evidence of the prior confrontation and threats and the testimony of doorman Bernard Mulholland and patron Tina Marie Bianchi that Marra fled the scene, dropped a black object during his flight, and then attempted to conceal that object in his waistband, permitted the jury to find that Marra shot Ragno.

Marra attempts to debunk this evidence by pointing to purported inconsistencies in the witnesses's testimony. Before turning to Marra's specific contentions, we note that his argument generally suffers from a failure to construe the evidence in the light most favorable to the prosecution. Instead, Marra couches the evidence in the light most favorable to him, again and again suggesting what inferences the jury *should* have drawn.

Marra's principal contention is that Murray's and Antonelli's versions of the facts are inconsistent because Murray said the killers had their backs to her, while Antonelli, sitting approximately in the same area as Murray, turned and saw Marra and his co-defendants facing her. This contention is unpersuasive. Simply put, in the time it took Antonelli to turn in the direction of the

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[3] Antonelli knew all three defendants socially from clubbing. She also knew Phillip Narducci, who was next to Antonelli and her girlfriend at the time of the murder; but more on Narducci later.

gun shot, Marra could well have turned around preparatory to exiting the club. The jury could, and presumably did, draw that inference.

Next, Marra places great weight on Antonelli's failure to see a body near him or to see a gun. As the government suggests, however, the jury could reasonably have inferred that Ragno's felled body was behind the three defendants. As for the gun, the jury could reasonably have inferred that it was at Marra's side and overlooked while Antonelli focused on his face, or was concealed in or obscured by Marra's clothing.

Marra also contends that Mulholland's and Bianchi's testimony is fatally inconsistent because Bianchi saw a man running down the stairs from the second floor, saw him drop a black object, pick it up, and place it in his waistband, while Mulholland did not observe this fumbling when he saw Marra running down the stairs. Again, this contention is unavailing because it views the evidence in the light most favorable to Marra. The jury could well have inferred that Mulholland and Bianchi observed Marra at different points as he descended the stairs, or could simply have given greater weight to Mulholland's testimony because he was able to positively identify Marra. It is undisputed, we note, that both witnesses thought Marra was concealing some object on his person.

At the end of the day, Marra simply alleges certain inconsistencies which the jury resolved in the prosecution's favor. The weakness in the prosecution's case was that no single witness could identify Marra as the shooter. Given the sequence of events, however, the jury could

readily have found that Murray's and Antonelli's testimony provided such an identification. Accordingly, the evidence was sufficient to support the jury's verdict.

B. *Grand Jury Transcript*

Marra next contends that his due process rights to a fair trial were violated because the trial court, in response to a jury note asking for specific grand jury testimony on which Antonelli had been questioned at trial, did not also reread her trial testimony concerning that grand jury testimony. Marra opines that the fairness of his trial "was destroyed" by the trial judge's response to the jury's note. Marra is wrong.

A trial court, of course, has discretion in deciding how to respond to a jury note. To prevail on his due process claim, Marra must show that the court's response violated the "fundamental fairness" essential to justice. *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

The disputed testimony centered on whether or not Antonelli had testified before the grand jury that she had seen a body behind Marra at the time of the shooting. On cross-examination during trial, Antonelli testified that she had not seen a body behind the three defendants. The prosecution then tried to establish that Antonelli had, in fact, seen a body by reading her the following questions and answers from her grand jury testimony:

> Q: When you turned you saw the three individuals standing *in front of the person that was shot* before the shot was fired?
>
> A: No, after.

Q: After?

A: Yes.

Joint App. 386:14-19 (emphasis added). The prosecution then asked Antonelli if she had testified before the grand jury that she "saw the three individuals standing in front of the person who was shot after the shot was fired?" Joint App. 387:3-5. Antonelli responded: "I never said I saw the body." Joint App. 387:6. Both sides then questioned Antonelli at some length about the meaning of her grand jury testimony.[4]

Shortly after commencing deliberations, the jury submitted a note requesting, among other things, "the testimony of Karen Antonelli." The trial judge explained that he would not give them anything in writing and that Antonelli's testimony had not yet been transcribed. He offered, at the behest of Marra's counsel, to read any specific portion of Antonelli's testimony the jury desired. The jury promptly returned with a note stating: "Could we please see the grand jury testimony of Karen Antonelli concerning the three people she saw before the shoot after the shoot?" A great debate as to the meaning of this note and how the court should respond followed, a debate which covered twenty-four pages of transcript.

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[4] As Marra correctly notes, the grand jury question at issue was compound because it assumed that Antonelli saw a body and that she turned towards Marra before the shot was fired. Before the grand jury, Antonelli corrected the prosecutor's assumption regarding the timing of her turn, but failed to notice or correct the assumption regarding the body. At trial, Antonelli corrected the latter assumption, or perhaps changed her story, that she had seen a body.

The trial judge concluded – apparently because of the jury's use of the words "before" and "after" the "shoot" – that the jury wanted to hear the Q & A quoted above and read only those lines to the jury. He also offered to read additional testimony if the jury so desired which, as it turned out, it did not.

Marra contends that the trial court's "overly literal response to the jury's question" denied the jury needed information. He opines that if "the jury understood the limited significance of Ms. Antonelli's response to the prosecutor's leading and compound question before the grand jury, and recalled her firm adherence to her direct testimony under cross-examination at trial, then a different outcome was highly likely." Appellant's Br. at 28.

Notwithstanding Marra's prognostication of a different outcome, he has unearthed no fundamental unfairness in the trial court's response to the jury's request.[5] What was read to the jury was precisely what it had requested. In addition, what was read had the benefit of omitting both side's interpretation of the meaning of the Q and A elicited during the examination of Antonelli at trial which presumably the jury recalled because it did not request a

[5] Marra's suggestion of a different outcome does not necessarily follow. If Antonelli changed her story at trial, it would have *helped* Marra because it would have undermined Antonelli's credibility. If the additional testimony requested by counsel, but not the jury, would have hammered home the point that Antonelli did not see a body, that, too, would have helped Marra. In other words, Marra, in some respects, had a "win-win" situation regardless of what the trial court did.

reread of that testimony. We simply do not detect any fundamental unfairness here.[6]

C. *Conflict of Interest*

Marra's final contention, *i.e.* that his trial counsel, Robert Simone, was ineffective because he operated under a conflict of interest, is the most intriguing. Unfortunately for Marra, however, it is also procedurally defaulted.

At the time of trial, Simone was also representing, and allegedly engaged in a criminal RICO conspiracy with, mob boss Nicodemo Scarfo. Simone was subsequently convicted and disbarred on consent for, as the District Court termed it, this "checkered history." Phillip Narducci – the Flanigan's patron sitting next to Antonelli at the time of Ragno's demise – allegedly worked for Scarfo in less than legal endeavors and was Scarfo's co-defendant in the case in which Simone represented Scarfo. Marra suggests that Narducci was the other "prime suspect" in the Ragno murder, and that Simone did not press this

[6] The authorities cited by Marra do not compel a different result. The two cases on which Marra most heavily relies are easily distinguished because the trial courts outright refused the jury's requests. *United States v. Rabb,* 453 F.2d 1012, 1013-14 (3d Cir.1971) (finding error where trial court refused to read any of the transcript of two witnesses's testimony in response to jury request); *United States v. Jackson,* 257 F.2d 41, 42-43 (3d Cir.1958) (finding error where court failed to respond to jury request about the government employment status of an informant where entrapment was a key defense in the case). The remaining cases stand for the unremarkable proposition that the trial court has a duty to state the law correctly and to be mindful that what it says to the jury in response to a note may deeply influence deliberations.

angle of the case enough out of deference to Scarfo and Narducci.

After Simone handled Marra's direct appeal to the Superior Court, Marra, represented by new counsel, raised his conflict of interest claim for the first time before the Pennsylvania Supreme Court in his petition for allocatur. The petition was denied without opinion in December 1989. Marra then re-raised the issue before the trial court in his March 1991 Post Conviction Relief Act ("PCRA") petition,[7] but did not present the issue in his subsequent appeal from the denial of his petition in June 1993 to the Superior Court or to the Pennsylvania Supreme Court in his allocatur petition.[8]

The District Court adopted the Magistrate Judge's initial Report and Recommendation which, as relevant here, determined that Marra's conflict of interest claim was procedurally barred because he failed to appeal the issue to the Superior Court or to the Pennsylvania Supreme Court and thereby denied the state courts a fair opportunity to address the issue. It subsequently adopted the second Report and Recommendation as well, finding that, as the Magistrate Judge determined, the claim was

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[7] The record does not contain Marra's original PCRA petition, does not otherwise demonstrate that Marra's conflict of interest claim was presented in his PCRA petition before the trial court, and the trial court's opinion denying the petition does not address that claim. Appellees, however, do not dispute that the conflict of interest claim was raised at that time and we will, therefore, assume for the purposes of this appeal that that claim was presented in Marra's PCRA petition.

[8] As discussed below, Marra contends that he did, in fact, raise this issue before the Superior Court.

defaulted and could not be resuscitated in the habeas proceeding.

It is well-settled, of course, that a prisoner must first present all federal claims to state court before a district court may reach those claims on federal habeas corpus review. 28 U.S.C. § 2254(b) & (c); *O'Sullivan v. Boerckel,* 526 U.S. 838, 843, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) ("[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."); *Caswell v. Ryan,* 953 F.2d 853, 857 (3d Cir.1992). To comply with this requirement, a petitioner is generally required to give the state courts a "full and fair opportunity" to address the merits. *O'Sullivan,* 526 U.S. at 844, 119 S.Ct. 1728; *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 10, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). "Full and fair opportunity" means presenting the issue in a manner that puts the state court on notice that the claim is being pursued so that the state court has a chance to resolve that claim, *i.e.,* some articulation of the sum and substance of the claim is required, not merely a whisper of constitutional impropriety. As the Supreme Court stated in *Keeney:*

> Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful. . . . Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.

Id.; *see also Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts. . . . In addition, the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim.") (citations omitted).

Procedural default also occurs where a petitioner failed to exhaust state remedies and the court to which he would have been permitted to present his claims would now find such claims procedurally barred. *Coleman v. Thompson,* 501 U.S. 722, 735, 111 S.Ct. 2546, 115 L.Ed.2d 640 n.* (1990); *Whitney v. Horn,* 280 F.3d 240, 252 (3d Cir.2002); *Wenger v. Frank,* 266 F.3d 218, 223-24 (3d Cir.2001), *cert. denied,* ___ U.S. ___, 122 S.Ct. 1364, 152 L.Ed.2d 358 (2002); *McCandless,* 172 F.3d at 261; *Caswell,* 953 F.2d at 857. To overcome procedural default in these circumstances, a petitioner must show either cause for the default and actual prejudice as a result of the alleged error or a fundamental miscarriage of justice if the claim is not considered. *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000); *Coleman,* 501 U.S. at 750, 111 S.Ct. 2546; *McCandless,* 172 F.3d at 261; *Caswell,* 953 F.2d at 861. The District Court held that Marra's conflict of interest claim was procedurally defaulted because he failed to pursue that claim before the Superior Court in appealing his PCRA petition, and he otherwise failed to carry his burden of showing "cause" and "prejudice" or a "fundamental miscarriage of justice."

On appeal, Marra does not dispute that he cannot show cause and prejudice or a fundamental miscarriage of justice or that his claim, if not fairly presented to the Pennsylvania courts, would now be procedurally barred.

He argues, however, that there is no bar to federal habeas review for two reasons. First, he asserts that his conflict of interest claim was preserved because it was actually presented, albeit obscurely, in his appeal to the Superior Court from the trial court's denial of PCRA relief, although he concedes that it was not "mentioned in words or substance" in his subsequent petition for allocatur to the Supreme Court. Appellant's Br. at 32 n.19. Second, he claims that, in any event, he did not need to pursue his conflict of interest claim in the appeals from the PCRA proceeding because the claim was raised in his petition for allocatur to the Supreme Court on direct appeal, which thereby gave the highest court in the state a chance to address the claim. We will address these arguments in turn.

Marra's contention that he actually presented his conflict of interest claim to the Superior Court is belied by the record. The crux of Marra's argument is that in the course of arguing to the Superior Court that counsel was ineffective for other reasons, he mentioned, albeit in one paragraph near the end of his fifty page brief, Simone's relationship to and legal representation of Narducci and cited two lines from Simone's testimony at the PCRA hearing as to whether he was wearing "two hats" during the trial. Appellant's Br. at 32.[9] In other words, Marra

[9] The "two hats" reference appeared in the brief in the midst of an ineffective assistance of counsel claim pertaining to Simone's failure to proffer an allegedly prior inconsistent statement by Antonelli as to the whereabouts of Narducci at the time of the shooting. The thrust of the legal argument in that portion of the brief was that the prior statement should have been proffered for impeachment. Nowhere is the phrase "conflict of interest" (or other indication that such a claim was being

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seems to contend that raising *some* ineffective assistance of counsel claims is sufficient to preserve *all* putative ineffective assistance of counsel claims, provided that some factual clues for such potential claims are referenced somewhere in the state court briefs.

The difficulty with Marra's argument is that merely alluding to facts that might constitute a separate ineffective assistance claim on conflict grounds is not enough to fairly present that claim, especially when the conflict claim was expressly presented before the PCRA court and then was not listed on appeal as an issue.[10] In effect, Marra punted on his conflict of interest claim on appeal, leaving the Superior Court with no reason to perceive, much less to pursue, that issue.[11] Indeed, the thrust of

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pursued) even mentioned. We also note that the colorful excerpts quoted from Simone's testimony are less provocative when read in context. Simone testified that he generally avoided "dumping" on co-defendants like DiOrio because it might have a spill-over effect on his client, and that he was not really concerned about implicating Narducci. He was concerned, however, that overplaying Narducci and his mob connections might have a negative impact on Marra. Simone never testified that he held back in defending Simone [sic] because of his relationship with Narducci, only that he did not press Narducci's potential involvement for a variety of reasons. A review of the trial record reveals that Simone raised Narducci's name several times during trial and vigorously cross-examined all of the state's key witnesses.

[10] *Accord Duncan v. Henry*, 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (finding procedural bar of due process claim regarding evidentiary rulings where claims were not presented at state level, and that that failure was "especially pronounced in that respondent did specifically raise a due process objection before the state court based on a different claim").

[11] Again, the cases cited by Marra are not to the contrary. For example, Marra first cites a number of cases for the proposition that a

(Continued on following page)

Marra's appeal to the Superior Court was a typical ineffective assistance of counsel claim based on alleged missteps at trial, rather than any challenge based on a conflict of interest. Accordingly, Marra failed to fairly present the substance of his conflict of interest claim to the Superior Court or to the State Supreme Court on the subsequent petition for allocatur and that claim is now procedurally barred under Pennsylvania law.

Marra's contention that his petition for allocatur on direct appeal to the Pennsylvania Supreme Court was itself a fair presentation is also unpersuasive. Marra notes that Pennsylvania law required him to raise his ineffective

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conflict of interest claim is a distinct type of ineffective assistance of counsel claim. We agree, but believe this is all the more reason why the conflict claim should have been separately and specifically raised. Marra also cites two of our prior decisions in support of his fair presentation argument. First, he cites *Landano v. Rafferty*, 897 F.2d 661, 668-73 (3d Cir.1990), for the proposition that he only had to present the facts underlying his conflict of interest claim and the "legal issue" in "substantially equivalent" fashion, and that he did so here by generally pursuing ineffective assistance of counsel claims. Ironically, we held in *Landano* that the petitioner *failed* to exhaust and reversed the District Court's grant of his habeas petition. *Id.* at 663. Moreover, *Landano* does not paint with as broad a brush as Marra suggests. *Landano* teaches that both the legal theory and the factual background underlying the federal claim must be presented to the state courts. *Id.* at 669. Accordingly, where the legal or factual theory varies from what was presented in state court, there has been no fair and full presentation. *Id.* ("[W]e believe that a general claim that the prosecutor has suppressed exculpatory information cannot satisfy the exhaustion requirement as to all subsequent *Brady* claims that a habeas petitioner may bring."). Second, Marra cites *Hess v. Mazurkiewicz*, 135 F.3d 905, 909-10 (3d Cir.1998), for the proposition that the state courts' failure to address his conflict of interest claim does not necessarily mean that the issue was not "fairly presented." *Hess* does stand for this proposition, but that does not establish the predicate requirement of fair presentation.

assistance counsel claim at the earliest appropriate opportunity after Simone's representation ended – here, on direct appeal to the Pennsylvania Supreme Court – to avoid waiver of that claim. *Commonwealth v. Green,* 551 Pa. 88, 709 A.2d 382, 384 (Pa.1998); *Commonwealth v. Hubbard,* 472 Pa. 259, 372 A.2d 687, 695 (Pa.1977).[12] Accordingly, the argument goes, because he was required to and did present the issue on direct appeal in his petition for allocatur, he "by definition" fairly presented his conflict of interest issue to the state's highest court, and is required to do no more for purposes of 28 U.S.C. § 2254.

Marra is mistaken because he misconceives the meaning of "full and fair presentation" and overlooks the role of the PCRA proceeding within Pennsylvania practice. As the United States Supreme Court recently explained, the full and fair presentation doctrine requires petitioners to "give the state courts one full opportunity to resolve any constitutional issues by invoking *one complete round* of the State's established appellate review process." *O'Sullivan,* 526 U.S. at 845, 119 S.Ct. 1728 (emphasis added); *Lines v.*

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[12] We note that the Pennsylvania Supreme Court recently granted a petition for allowance of appeal to address, among other things, the vitality of this doctrine. *Commonwealth v. Grant,* 566 Pa. 231, 780 A.2d 601 (Pa.2001). We need not await the Court's decision, however, because the procedural default question presented does not turn on whether or not *Hubbard* and its progeny will continue to be the law in Pennsylvania. Nor need we determine whether the District Court was correct when, in adopting the initial Report and Recommendation of the Magistrate Judge, it held that Marra's petition for allowance of appeal was not a fair presentation because Pennsylvania Rule of Appellate Procedure 302 prohibits the inclusion of claims in such petitions that were not raised on direct appeal before the Superior Court. As discussed below, there are ample other reasons why Marra's petition to the Supreme Court on direct appeal did not fairly present the issue.

Larkins, 208 F.3d 153, 159 (3d Cir.2000) ("All claims that a petitioner in state custody attempts to present to a federal court for habeas corpus review must have been fairly presented to each level of the state courts."), *cert. denied,* 531 U.S. 1082, 121 S.Ct. 785, 148 L.Ed.2d 681 (2001); *see also Castille v. Peoples,* 489 U.S. 346, 349-51, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989). Under this teaching, the state appellate courts must reach the merits of the federal claim at some point, after which, in Pennsylvania, the state Supreme Court's denial of discretionary review can be sufficient to preserve the federal claim (provided that the claim was presented in the allocatur petition).

Here, the Superior Court on appeal from the denial of the PCRA petition was not given a fair shot at petitioner's conflict of interest claim and the issue was not presented in the subsequent petition to the Supreme Court. Marra's presentation of his conflict of interest claim to the Supreme Court on direct appeal was not itself a "full and fair" presentation because, at that point, Pennsylvania's PCRA procedure remained available to him and, in fact, later developed the record – in the form of Simone's testimony – upon which his conflict of interest claim now heavily depends. Thus, the claim Marra pursues here on appeal is different (because of Simone's intervening testimony) than the claim briefed to the state Supreme Court on direct appeal. *Castille,* 489 U.S. at 349-51, 109 S.Ct. 1056 (holding that mere presentation of claim to Pennsylvania Supreme Court, without recourse to collateral review, in a petition for allocatur was insufficient to satisfy habeas exhaustion requirements); *Evans,* 959 F.2d at 1230 ("A claim is not deemed exhausted if it is raised for the first time in the state's highest court on discretionary review."). Indeed, in the typical case in which the Pennsylvania Supreme Court denies a petition for allocatur on

direct appeal, a prisoner's recourse is to initiate a PCRA proceeding because the denial of allocatur is not itself a decision on the merits. *Commonwealth v. Davis,* 546 Pa. 158, 683 A.2d 873 (Pa.1996).

Parenthetically, Marra's contention that his exhaustion responsibilities were complete upon filing his allocatur petition on direct appeal, taken to its logical extreme, would mean that he was not obligated to initiate a PCRA proceeding prior to filing his habeas corpus petition. Such a contention is untenable where the evidence underlying the conflict of interest claim had, at that time, never been presented to a state court and no appellate court had reached the merits of his claim, *i.e.,* this is not a case in which it would have been futile or repetitive to insist that Marra pursue collateral relief in the state courts. *Compare Castille,* 489 U.S. at 350, 109 S.Ct. 1056 (noting "that once the state courts have *ruled* upon a claim, it is not necessary for a petitioner" to seek collateral relief based on the same evidence and issues already decided on direct appeal) (emphasis added).

At the end of the day, it can hardly be said that the Pennsylvania courts were "fairly presented" with a "full opportunity" to assess Marra's conflict of interest claim where the Superior Court was never explicitly presented with the claim and where the facts upon which the claim primarily relies were developed in a PCRA hearing held more than two years after Marra's direct appeal to the Supreme Court. Marra has simply not pursued a complete round of appellate review on his conflict claim and, accordingly, that claim is procedurally barred.

III.

For all the foregoing reasons, we will affirm the order of the District Court denying the petition for habeas corpus.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

111 F.Supp.2d 575

United States District Court,
E.D. Pennsylvania.

Richard J. MARRA, Petitioner

v.

David LARKINS, Superintendent Dallas SC[I]., and District Attorney for Philadelphia County, and The Attorney General of the State of Pennsylvania,
Respondents

Civil Action No. 96-2375.

Aug. 15, 2000.

Peter Goldberger, Law Office of Peter Goldberger, Ardmore, PA, for petitioner.

Donna G. Zucker, Philadelphia, PA, Thomas Dolgenos, Assistant District Attorney, District Attorney's Office, Philadelphia, PA, for respondents.

ORDER

POLLAK, District Judge.

Upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, together with petitioner's objections and respondents' responses thereto, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The Petition for Reconsideration of the dismissal of the Petition of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is DENIED.

3. It is hereby CERTIFIED that there is probable cause for appeal of the denial of the Petition for Habeas Corpus.

OPINION

Richard Marra, who is serving a life sentence in a Pennsylvania prison for the first degree murder of Michael Ragno,[1] has challenged his murder conviction by petitioning for habeas corpus pursuant to 28 U.S.C. § 2254.

In his petition for habeas corpus, Mr. Marra presented three claims. The first claim was that the evidence was insufficient to support the murder conviction. The second claim was that the trial judge, in responding to the jury's request that grand jury testimony of a key prosecution witness, Karen Antonelli, be reread, had taken so narrowly literal a view of the jury's request that the testimony read back to the jury was likely to have conveyed a radically and crucially skewed sense of what the witness had seen. The third claim was that trial counsel Robert Simone had been markedly ineffective. This claim had two parts. The first was that counsel should have presented character witnesses. The second was that Mr. Simone was laboring under a conflict of interest – namely, a close link

[1] Mr. Marra was also found guilty of possessing an instrument of crime – the gun with which he was alleged to have shot Mr. Ragno – and was sentenced to two-and-a-half years sequential to the life sentence.

to Phillip Narducci – that led him to refrain from presenting evidence (statements and a videotape) inculpatory of Mr. Narducci and of a co-defendant of Mr. Marra's.

Magistrate Judge Smith filed a Report and Recommendation recommending denial of the petition for habeas corpus. Judge Smith found the evidence against Mr. Marra to be sufficient to support the verdict. He concluded that the trial judge had not abused his discretion in determining what portion of Ms. Antonelli's testimony should be reread to the jury. And he determined that trial counsel's decisions not to present certain types of evidence in Mr. Marra's defense were strategic choices that were not unreasonable. Judge Smith also found that Mr. Marra's claim that Mr. Simone had a disabling conflict of interest had not been sufficiently pursued in the state courts and hence was procedurally barred in this habeas proceeding.

I accepted Judge Smith's Report and Recommendation, modifying it somewhat to reflect my differing understanding of the evidence presented by the Commonwealth at trial. The record as I read it added up to a weaker prosecution case; but I concluded, nonetheless, that the evidence against Mr. Marra was sufficient to support a conviction. On the other issues I found no reason to question Judge Smith's assessment.

Mr. Marra, proceeding *pro se,* moved for reconsideration. I denied the motion. Meanwhile, Mr. Marra had retained new counsel who, three days after denial of the motion for reconsideration, moved that the order denying reconsideration be vacated with a view to permitting the filing of more substantial submissions. I granted that motion. Additional submissions were filed. I referred the

case back to Judge Smith for preparation of a new Report and Recommendation addressed to new counsel's arguments in favor of the motion for reconsideration.

Judge Smith has prepared a new Report and Recommendation recommending denial of the motion for reconsideration.

I conclude that Judge Smith's recommendation should be sustained:

(1) The most difficult question is whether there was sufficient evidence to support the verdict. Judge Smith's careful analysis is, in my view, persuasive that the evidence was sufficient – even if only by a narrow margin:

> In the court's request for Reconsideration, it was observed that Karen Antonelli's testimony was less inculpatory than I earlier found because the record "does not support a finding that Ms. Antonelli saw the petitioner standing by the body of the victim. In fact she explicitly stated at trial that she did not see the body at all."[8] He added that "taken alone, Ms. Antonelli's testimony is of limited value in supporting the inference that petitioner was one of the three men seen by Ms. Murray." Memorandum at 2.
>
> Upon review of Ms. Antonelli's testimony, I agree that, taken alone, her testimony does not establish plaintiff as the shooter and is not itself inculpatory. The same can be said for the testimony of Williams Rodgers, Susan Murray, Tina Marie Bianchi, and Bernard Mulholland. Taken individually, none of this testimony would be sufficient to convict petitioner since Murray, Bianchi, and Mulholland could not

identify petitioner as the murderer and Antonelli testified that she did not see the body near the defendants. However, each of these witnesses' testimony is probative and their cumulative effect "based on an interpretation of the facts and *inferences* (emphasis added) made most favorably to the prosecution," could rationally lead a jury to conclude that the petitioner was guilty of first degree murder.[9] *Jackson v. Virginia,* [443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)].

In assessing the totality of the testimony before them, the jury heard: 1) Rodgers testify about the confrontation between the victim and the petitioner and his threat to Ragno that "You'll see who I am"; 2) Susan Murray testify that she saw a man in the middle of three fire a gun and shoot the victim; 3) Karen Antonelli testify that she turned and looked at the area where the loud noise came from and identified petitioner as the one in the middle, and her possibly conflicting grand jury testimony, that they wanted reread to them during deliberations, which put into question whether she saw the defendants near the body; 4) Tina Marie Bianchi testify that she saw someone run down the steps immediately after the "loud noise" and apparently conceal a dark object in his pants; and 5) Bernard Mulholland corroborate Rodgers' and Bianchi's testimony concerning the threats made to Ragno at the earlier confrontation and petitioner['s] actions after the shot being the first to run out of the club with his hand in his pocket apparently concealing something and flee in a car later found burned and registered to the petitioner's family.

> From this testimony and the inferences permitted to be drawn from such under *Jackson,* I find that a rational trier of fact could have found the essential elements of the crime of first degree murder beyond a reasonable doubt. *Sullivan v. Cuyler,* [723 F.2d 1077 (3d Cir.1983)]; *Jackson v. Virginia.*
>
> [8] Relying on the trial testimony as related in the state court decisions, I erroneously wrote in my prior Report that Susan Murray saw the three men in a "semi-circle" and that Karen Antonelli observed the men standing over the body. Report and Recommendation at 10.
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> [9] Under 18 Pa.C.S.A. § 2502, first degree murder is defined as follows:
>
> > A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

Report and Recommendation, at 10-12 (Mar. 30, 1999).

(2) Closely related to the question of the sufficiency of the evidence is the question whether the trial judge responded adequately to the jury's request for the rereading of grand jury testimony of Karen Antonelli. It is the defendant's view that the rereading provided by the trial judge was so limited as to permit the jury to draw the inference that Ms. Antonelli saw Mr. Marra and his co-defendants standing in front of the body of the murder victim right after the shooting. Such an inference would have been highly inculpatory. But such an inference would have been at odds with Ms. Antonelli's trial testimony (on

redirect examination that followed the prosecution's confronting Ms. Antonelli with her grand jury testimony) that "I never said I saw a body." Although a strong case can be made for the proposition that it would have been prudent for the trial judge to include in his rereading the pertinent portion of the redirect, I am not persuaded that the trial judge's decision to limit the rereading to the grand jury colloquy was an abuse of discretion of constitutional dimension. (In reaching this conclusion, I am mindful that (1) what the jury requested be reread was grand jury testimony, and (2) the trial judge advised the jury that he would entertain jury requests for the rereading of additional testimony if the jury felt the need for it).

(3) (a) For the reasons addressed by Judge Smith, Mr. Marra's claim that Robert Simone's representation of him at trial was constitutionally deficient is unavailing. Other lawyers might have thought it useful to present character testimony, or might have sought to introduce evidence inculpatory of Phillip Narducci and Jeffrey DiOrio, but Mr. Simone's decisions not to do so were not demonstrably unwarranted.

(b) Mr. Marra's claim that Mr. Simone, because of his close association with Phillip Narducci, had an unacceptable conflict of interest, was found by Judge Smith, in his first Report and Recommendation, to be procedurally defaulted. The claim was presented by Mr. Marra on direct appeal in Mr. Marra's petition for allocatur in the Pennsylvania Supreme Court. The claim was again presented in Mr. Marra's application to the trial judge for post-conviction review (P.C.R.A.). But, following the trial judge's denial of post-conviction relief, the claim was not among the issues Mr. Marra presented on appeal

to the Superior Court, or, thereafter, by petition for allocatur to the Pennsylvania Supreme Court.[2] Therefore, as Judge Smith determined, the claim cannot be resuscitated in this habeas proceeding.

Conclusion

For the foregoing reasons, the motion for reconsideration will be denied and the petition for habeas corpus will also be denied. At the same time, given that the issue of the sufficiency of the evidence is certainly a close one, the determination that the evidence was constitutionally sufficient is "debatable among jurists of reason." *Barefoot v. Estelle,* 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). I therefore conclude that it is appropriate to accompany denial of the petition with the issuance of a certificate of probable cause for appeal.[3]

REPORT AND RECOMMENDATION

SMITH, United States Magistrate Judge.

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[2] The record in this habeas proceeding sheds no light on why this claim – a claim which, given Mr. Simone's checkered history, may just possibly have had some merit – was not pursued.

[3] A "certificate of probable cause" for appeal, rather than a "certificate of appealability," is the touchstone for appealability in this case, given that this habeas proceeding was commenced in March of 1996. Appeals from petitions for writ of habeas corpus filed prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act – April 24, 1996 – are not subject to the requirements for issuance of a certificate of appealability contemplated in that act; they are subject to the standards for issuance of certificates of probable cause articulated in *Barefoot.*

PROCEDURAL HISTORY

Presently before me is a Motion for Reconsideration from a denial of a Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. § 2254. For the reasons which follow, it is recommended that the motion be denied[1].

Petitioner was charged with murder and related offenses, including conspiracy, in the shooting death of Michael Ragno at Flanigan's Bar in Philadelphia in the early morning hours of January 13, 1986. On September 29, 1987, after a trial presided over by the Honorable Albert F. Sabo of the Philadelphia County Court of Common Pleas, a jury convicted petitioner of first degree murder and possession of an instrument of crime. The jury acquitted petitioner's co-defendants, Louis DeAngelo and Jeffrey DiOrio, of all charges. On December 22, 1987, Judge Sabo denied petitioner's post-verdict motions and sentenced him to life imprisonment for murder, and a consecutive term of two and a half years for the weapon's offense.

In the habeas petition, at issue, filed on March 22, 1996,[2] petitioner raised the following claims:

1. the evidence was insufficient to support the verdict of first degree murder;

2. the trial court erred in rereading only a portion of Commonwealth witness, Karen Antonelli's

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[1] As will be explained, *infra*, I filed a previous Report and Recommendation in this case. The procedural history from petitioner's sentencing to the filing of his habeas petition is detailed in that Report.

[2] Petitioner, at this time, was being represented by Timothy P. Keating, Esquire.

grand jury testimony in response to a jury request; and

3. trial counsel, Robert Simone, Esquire, rendered ineffective assistance of counsel in that he:

a. failed to call character witnesses on behalf of petitioner;

b. engaged in a conflict of interest that compromised his representation of the petitioner;

c. because of such conflict, Simone failed to introduce incriminating statements of Phillip Narducci and co-defendant, Jeffrey DiOrio, and

d. failed to play an entire videotape made on the night of the murder of the entrance to Flanigan's nightclub.

On January 16, 1997, I filed a Report and Recommendation recommending that the petition be denied and dismissed without an evidentiary hearing. Specifically, I found that plaintiff's claim of trial counsel's alleged conflict of interest had been procedurally defaulted and determined the other claims to be without merit. On August 18, 1997, the Honorable Louis H. Pollak approved and adopted the Report and Recommendation subject to a qualification noted in a Memorandum that he filed on this same date and the case was marked "closed."

Thereafter, on September 2, 1997, petitioner filed a Motion for Reconsideration. Current counsel, Peter Goldberger, Esquire, entered his appearance on October 10, 1997. On October 14, Judge Pollak denied the Motion for Reconsideration. Petitioner filed a Motion to Vacate this order and on October 23, it was granted allowing petitioner time to file a brief. Such was filed and the

Philadelphia District Attorney's Office filed a response. On July 27, 1998, Judge Pollak issued a Memorandum and Order remanding this case to me for further consideration and preparation of a new Report and Recommendation. In this Memorandum, he notes that the Motion for Reconsideration again raises the issue of sufficiency of the evidence and specifically the testimony of Karen Antonelli, the issue of trial court error in permitting the jury to rehear a portion of Antonelli's testimony without the inclusion of relevant cross-examination, and ineffective trial counsel[3].

DISCUSSION

A Motion for Reconsideration is the equivalent of a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e). The purpose of such is to "correct manifest errors of law or fact or to present newly discovered evidence." *Harsco v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir.1985), *cert. denied* 476 U.S. 1171, 106 S.Ct. 2895, 90 L.Ed.2d 982 (1986).[4]

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[3] In the Motion for Reconsideration, petitioner concedes that the claim of Simone's alleged conflict of interest has been procedurally defaulted and makes no argument to the contrary.

[4] While I was preparing my first Report and Recommendation in this case, the Philadelphia Prothonotary's Office was unable to produce the state records including any trial testimony indicating that they were misplaced or lost. Thus, in that Report, I had to rely on the trial testimony as related by the state court decisions. As Judge Pollak points out in his Memorandum, some of the cited testimony in my Report was not reflected in the actual record. This will be discussed, *infra*. However, since that time, petitioner's attorney, Peter Goldberger, was able to reproduce the entire record and had forwarded such to Judge Pollak. Upon no objection from the Philadelphia District Attorney, my office obtained this reproduced record and will use it to revisit

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1. *Sufficiency of the Evidence*

Plaintiff first claims that the evidence was insufficient to support the verdict of first degree murder. The sufficiency question for habeas courts is not whether there was any evidence to support a conviction, but "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Sullivan v. Cuyler,* 723 F.2d 1077 (1983), *quoting Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original); *Paullet v. Howard,* 634 F.2d 117 (3d Cir.1980).

With the benefit of the complete transcript of the trial, I will first outline the testimony of the key witnesses[5], and then consider such under the legal standard set forth above.

Michael Ragno was shot to death in Flanigan's nightclub in the early morning hours of January 13, 1986. There is not much dispute that the victim and the petitioner, earlier in the evening, had engaged in an argument as a result of Ragno talking to the petitioner's girlfriend.

William Rodgers, the victim's friend, testified at trial that he, Michael Ragno, and a Gregory Adair went to Flanigan's after earlier being at another nightclub. He stated that he was in the process of paying a cover charge

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the trial testimony and address the merits of the claims. Testimony cited from such will be referred to as "R.R.".

[5] Some of which may be repeated or reiterated from my first Report and Recommendation.

for all three to enter the club when a male and two females also entered. He knew one female and said "hi" to her. She said "hi" and the petitioner, whom he identified, stated, "that's my girlfriend." The girl said to him that she knew these individuals. Rodgers testified further that Ragno stepped up and the petitioner said, "What's the problem?". Ragno said in response, "Why don't you just relax?". Petitioner stated, "You don't know who I am." Ragno responded, "What's that supposed to mean?". Petitioner said, "You'll see who I am." Petitioner then ran out of the club. Rodgers did not see the shooting since he had gotten separated from Ragno, but did say that it occurred about an hour after this confrontation (R.R. 9/21/87 at 110-123).[6]

There is also not much dispute as to what Commonwealth witness, Susan Murray, testified to at trial. She had been at another nightclub earlier in the night and had met the victim there. She went to Flanigan's about midnight and was at a second floor smaller bar area with friends when she saw Ragno. He said to her that he was going to the restroom and to "stay there and I'll be back." She then observed that he was approached by three men who backed him against a wall standing about a foot away. She turned for an instant to express concern to a friend because Ragno's expression had changed to one of fear. When she turned back around, she was certain that she saw the person in the middle of the three raise his hand with a gun. She then saw a flash and heard a loud noise.

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[6] This testimony concerning the confrontation and the words spoken was corroborated by Bernard Mulholland, the doorman at the club that night and will be discussed, *infra*.

She went over to the victim and saw that he had been shot in the face. A girlfriend grabbed her and they fled the club. She could not identify any of the three men and stated on cross-examination that she didn't initially tell the police this story because she was frightened due to her perceptions of the reputations of the people involved (R.R. 9/22/87 at pp. 147-209).

The reproduced record reflects that Karen Antonelli testified that she knew the defendants socially. She stated that she was in the upstairs area of the club when she heard a loud noise which sounded like a firecracker, but in her mind she believed it to be a gunshot. She turned toward the area where the noise came from and saw all three of the defendants standing in a semicircle with Richard Marra being in the middle. She testified that she couldn't recall if co-defendants De Angelo and DiOrio were on his left or right, but had no doubt that the petitioner was in the middle. Like other patrons of the club, she exited quickly. She stated that she never saw the person who got shot or a weapon in the hand of anyone. She reiterated on direct and cross-examination that she did not see a body in front of these men. She also acknowledged that there were other groups of men in this upstairs area (R.R. 9/22/87 at 253-282).

On redirect examination, the Commonwealth in response to Ms. Antonelli's testimony that she never saw a body near the defendants, asked if she remembered a question and answer from her from her [sic] grand jury testimony:

> "Question: When you turned you saw the three individuals standing in front of the person that was shot before the shot was fired?

"Answer: No, after.

"Question: After?

"Answer: Yes

So you even corrected Mr. Gottlieb [the Assistant District Attorney at this hearing] when he asked the question saying did you see the three males with the body before the shot? Isn't that right?

Mr. Tinari [defense counsel representing co-defendant, DiOrio]: Objection

The Witness: Yes

The Court: Overruled."

She responded that she never saw a body (R.R. 9/22/87 at 279-280). However, as will be discussed, *infra,* the jury apparently believed that this testimony was very important in assessing her credibility as to whether she did see the body since they asked to have this testimony reread to them during deliberations.

Another patron of Flanigan's on this night, Tina Marie Bianchi, also testified at trial. She stated that she was in Flanigan's getting ready to go home and was standing directly across from the landing of the bottom of the steps which led up to the second floor bar area where the shooting occurred. While there, she heard a loud bang from upstairs, looked up, and saw two men running down the stairs, one in front of the other. As the first man reached the bottom of the steps, he lost his footing and began to slide. When he reached the landing, he never stopped, although he was sliding, but bent over to pick something up. It appeared to her that he was placing this object in his waistband. She was certain that this person was the first man down the steps with the other behind him. She

described the object as dark and slightly bigger than his hand, but couldn't discern a shape. She couldn't identify him, but said that he was very well dressed, wearing a dark suit with a red tie and that he had a mustache. The two men then ran out of her view and toward the exit (R.R. 9/22/87 at 324-340).

Bernard Mulholland, a doorman at Flanigan's on the night in question, corroborated William Rodgers' testimony that he observed the initial confrontation between petitioner and Michael Ragno. He testified that he heard statements from the petitioner which were very similar as to what Rodgers heard during this incident that, "you don't know who I am" and "you don't know who you are f – king with." Petitioner then ran out of the club (R.R. 9/23 at 376-381).

Mulholland's testimony also corroborated Tina Marie Bianchi's testimony concerning petitioner possibly concealing an object, but unlike Bianchi, he positively identified the petitioner. He testified that about an hour or an hour and a half after the argument between the victim and the petitioner, he heard a loud noise. He remained at the door of the club and no one had exited when he saw petitioner come running down the stairs with a co-defendant behind. He identified petitioner as the individual who had earlier that night been involved in the argument. He testified further that petitioner had his hand thrust into his pocket. Mulholland believed petitioner was concealing a gun and shouted, "look out, he's got a gun, he's got a gun." Mulholland also witnessed the two men run out of the club, cross

the street, and get into a parked black Cadillac and flee[7] (R.R. 9/23/87 at 382-400).

In addition, this car, which was registered to the petitioner's family, was deliberately set on fire and destroyed just hours later according to an investigation by the Philadelphia Police Department.

In the court's request for Reconsideration, it was observed that Karen Antonelli's testimony was less inculpatory than I earlier found because the record "does not support a finding that Ms. Antonelli saw the petitioner standing by the body of the victim. In fact, she explicitly stated at trial that she did not see the body at all."[8] He added that "taken alone, Ms. Antonelli's testimony is of limited value in supporting the inference that petitioner was one of the three men seen by Ms. Murray." Memorandum at 2.

Upon review of Ms. Antonelli's testimony, I agree that, taken alone, her testimony does not establish plaintiff as the shooter and is not itself inculpatory. The same can be said for the testimony of Williams Rodgers, Susan Murray, Tina Marie Bianchi, and Bernard Mulholland. Taken

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[7] Although there is no question that other patrons of Flanigan's on this night were wearing jackets and ties, and Bianchi couldn't positively identify petitioner, Mulholland did corroborate her testimony that the person she saw coming first down the steps, which he did [sic] identified as the petitioner, was wearing a dark jacket with a tie and also had a mustache (R.R. 9/23/87 at 391,395).

[8] Relying on the trial testimony as related in the state court decisions, I erroneously wrote in my prior Report that Susan Murray saw the three men in a "semi-circle" and that Karen Antonelli observed the men standing over the body. Report and Recommendation at 10.

individually, none of this testimony would be sufficient to convict petitioner since Murray, Bianchi, and Mulholland could not identify petitioner as the murderer and Antonelli testified that she did not see the body near the defendants. However, each of these witnesses' testimony is probative and their cumulative effect "based on an interpretation of the facts and *inferences* (emphasis added) made most favorably to the prosecution," could rationally lead a jury to conclude that the petitioner was guilty of first degree murder.[9] *Jackson v. Virginia, supra.*

In assessing the totality of the testimony before them, the jury heard: 1) Rodgers testify about the confrontation between the victim and the petitioner and his threat to Ragno that "You'll see who I am"; 2) Susan Murray testify that she saw a man in the middle of three fire a gun and shoot the victim; 3) Karen Antonelli testify that she turned and looked at the area where the loud noise came from and identified petitioner as the one in the middle, and her possibly conflicting grand jury testimony, that they wanted reread to them during deliberations, which put into question whether she saw the defendants near the body; 4) Tina Marie Bianchi testify that she saw someone run down the steps immediately after the "loud noise" and apparently conceal a dark object in his pants; and 5) Bernard Mulholland corroborate Rodgers' and Bianchi'

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[9] Under 18 Pa.C.S.A. § 2502, first degree murder is defined as follows:

> A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

[sic] testimony concerning the threats made to Ragno at the earlier confrontation and petitioner actions after the shot being the first to run out of the club with his hand in his pocket apparently concealing something and flee in a car later found burned and registered to the petitioner's family.

From this testimony and the inferences permitted to be drawn from such under *Jackson,* I find that a rational trier of fact could have found the essential elements of the crime of first degree murder beyond a reasonable doubt. *Sullivan v. Cuyler, supra; Jackson v. Virginia, supra.*

2. *Trial Court Error*

Petitioner next argues that the trial court abused its discretion when it allowed only a portion of Karen Antonelli's testimony to be read to the jury without the accompanying cross-examination, thereby placing "undue influence" upon a particularly prejudicial portion of testimony, namely grand jury testimony.

I begin with outlining the relevant case law, as in my previous Report and Recommendation. Review of this claim is restricted to whether the alleged error deprived the petitioner of a fundamentally fair trial. *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

When a jury requests that recorded testimony be read to it to refresh its memory, it rests within the trial court's discretion to grant or deny such a request. The parameters concerning the extent that testimony should be read to the jury are to be set by the jury's request. "Hence the court, if it deems it appropriate, may permit the jury to hear only a

portion of a witness' testimony." *Commonwealth v. Bell,* 328 Pa.Super. 35, 54, 476 A.2d 439 (1984) (allocatur denied); *see also, Commonwealth v. Peterman,* 430 Pa. 627, 244 A.2d 723 (1968); *Commonwealth v. Coley,* 297 Pa.Super. 435, 444 A.2d 110 (1982).[10]

The record here indicates that the court received a question from the jury during deliberations asking, "could we please see the grand jury testimony of Karen Antonelli concerning the three people she saw before the shoot[ing] and after the shoot[ing]." In support of this claim, petitioner's counsel cites a case, *United States v. Rabb,* 453 F.2d 1012 (3d Cir.1971), which used a test to determine whether there has been an abuse of discretion in denying a jury request for clarification.

However, this case has no relevance here because the trial judge never denied the jury's request, but rather, as the record reflects, was very concerned about answering the question. In fact, there was a long heated discussion between counsel and the trial judge, outside the presence of the jury, in an attempt to determine specifically what the jury wanted read to them. Judge Sabo repeated several times that he intended to give the jury what it requested, but was attempting to determine exactly what that was. As is within his discretion to do, he determined what he would read to the jury to satisfy their inquiry. He went on to specifically read the grand jury question posed to Karen Antonelli and her answer. He further said to the

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[10] There is no inflexible rule that exists which mandates that in reading back testimony to the jury, cross-examination always must be read. *United States v. Bennett,* 75 F.3d 40 (1st Cir.1996); *United States v. Wright-Barker,* 784 F.2d 161 (3d Cir.1986).

jury that, "if there's anything else that you need for your deliberation, let me know but try to be more specific in your questions." Thus, this claim is meritless since Judge Sabo, after much debate and consideration, answered the jury's specific question and invited them to ask more questions if they so desired[11] (R.R. 9/28/87 at 819-849).

3. *Ineffective Assistance of Counsel*

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), created a two-prong test that a petitioner must satisfy before his conviction will be overturned on ineffective grounds. First, he must show that counsel's performance was deficient, and secondly, he must show that the deficiency prejudiced his defense to such an extent that the result is unreliable. *Id.* at 687, 104 S.Ct. 2052.

The standard against which the attorney's performance is measured is reasonableness; counsel's performance

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[11] Although the issue is not raised in counsel's Memorandum for Reconsideration, petitioner, in his own authored Petition for Reconsideration, contends that this court should focus on the jury's first question, asking to having [sic] all of the testimony of Karen Antonelli read to them. However, using his discretion, Judge Sabo declined to read the entire testimony and was concerned with addressing any specific questions the jury had about Antonelli's testimony. He told the jury to "trust their own memories", and try and resolve among themselves what part of her testimony they were interested in (R.R. 9/28/87 at 824). As is discussed above, this is what occurred. The jury came back and requested that a particular portion of her grand jury testimony be read to them. Judge Sabo did so and offered to read more if requested (R.R. 9/28/87 at 829, 849).

must comply with prevailing professional norms. *Id.* at 688, 104 S.Ct. 2052. The Court instructed:

> " . . . (the reviewing court) must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct . . . "

Id. at 690, 104 S.Ct. 2052.

Above all, the reviewing court must make certain that the petitioner received a fair trial with a just result. *Id.* at 686, 104 S.Ct. 2052.

a. *Failure to Call Character Witnesses*

Trial counsel's performance cannot be deemed "deficient" under *Strickland's* first prong. Simone's decision not to call character witnesses was a reasonable strategic decision. He testified at a PCRA hearing that he was aware that plaintiff was a "candidate for the offering of character witnesses" since he was not aware of a prior criminal record[12] (R.R. 3/17/92 at 937). He concluded, however, as did the attorneys of the two co-defendants, that the Commonwealth had not met its burden of proof and decided because of the Commonwealth's weak case that he intended not to offer any defense evidence.

Simone recalled his reasoning for not presenting such in his PCRA testimony. He stated that there was no identification of the shooter and that there were so many people in the club besides the petitioner that there was at

[12] As was noted in my first Report and Recommendation, petitioner had been arrested for assault two years prior to the murder.

least a reasonable doubt as to his guilt in the shooting (R.R. 3/17/92 at 954). Apparently this was sound trial strategy since both of Simone's co-counsel employed the same reasoning and the co-defendants were both acquitted of all charges. Thus, petitioner's claim fails under *Strickland's* first prong[13].

This claim also fails under *Strickland's* second part – that counsel's deficiency prejudiced petitioner's defense. Petitioner's counsel argues in his brief that my rejection of "the ineffective assistance claims is factually dependent on the erroneous recitation of the evidence of guilt (having relied on same mistaken description of Antonelli testimony)." Brief at 12. This argument fails because, as discussed in detail above, I have corrected any Antonelli testimony that may have been misstated in my prior Report and Recommendation and concluded that the totality of her testimony with that of the other key witnesses presented at trial was sufficient under the *Jackson v. Virginia, supra,* standard for a "rational trier of fact" to conclude that the petitioner was the shooter of the victim[14]. Thus, the petitioner has failed to establish that trial

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[13] The defense has no obligation to call or even to interview a witness whose testimony would not have exculpated the petitioner or would have been inconsistent with the theory of defense. *United States v. Porter,* 924 F.2d 395, 397 (1st Cir.1991).

[14] Moreover, complaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of what a witness would have testified to are largely speculative. *Lockhart v. McCotter,* 782 F.2d 1275 (5th Cir.1986); *see also Murray v. Maggio,* 736 F.2d 279, 282 (5th Cir.1984); *Boyd v. Estelle,* 661 F.2d 388, 390 (5th Cir.1981).

counsel's decision not to call character witnesses prejudiced his defense[15].

In conclusion, the standard in reviewing a Motion for Reconsideration is "to correct manifest errors of law or fact or present newly discovered evidence." *Harsco v. Zlotnicki, supra.* Petitioner has failed to establish such and the motion should be denied.

Therefore, I make the following:

RECOMMENDATION

AND NOW, this 26th day of March, 1999, IT IS RESPECTFULLY RECOMMENDED that the Motion for Reconsideration of the dismissal of the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, be DENIED and DISMISSED WITHOUT AN EVIDENTIARY HEARING.

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[15] Petitioner's second ineffective claim that Simone failed to introduce into evidence incriminating statements made by Philip Narducci and co-defendant Jeffrey DiOrio that were exculpatory to the petitioner was discussed, in detail, in my previous Report. It is noted that Simone testified at a PCRA hearing that it was a strategic decision not to attempt to use these statements because he considered them harmful to the defense and helpful to the prosecution. He "thought if it would hurt Jeffery DiOrio, there would be a spillover effect [to petitioner]" (R.R. 3/17/92 at 945-6).

Likewise, petitioner's last ineffective claim that counsel failed to play the entire videotape of patrons entering and leaving Flanigan's on the night in question was also thoroughly considered in the prior Report. Thus, these issues will not be revisited.

There is no probable cause to issue a certificate of appealability.

March 26, 1999.

J.21008/89

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RICHARD MARRA, Appellant	:	NO. 238 PHILADELPHIA 1988

Appeal From Judgment of Sentence December 22, 1987
In Court of Common Pleas, Criminal Division
Philadelphia County, No. 8607, 2576-2577

(Filed May 26, 1989)

BEFORE: CAVANAUGH, MONTEMURO and CERCONE, JJ.:

MEMORANDUM:

This is a direct appeal from judgment of sentence. Appellant Richard Marra was convicted by a jury of first-degree murder, for which he was sentenced to life imprisonment. Appellant was also convicted of possessing an instrument of crime, resulting in a consecutive sentence of two and one-half to five years imprisonment.

Appellant and a female companion went to Flanigan's, a Philadelphia nightclub. Michael Ragno, a patron at the club spoke with appellant's companion. This angered Marra and words were exchanged between the two men. Marra left the club, but later returned with two other men. These three then approached Ragno and forced him against a wall, while Marra pulled out a gun and shot Ragno once in the head.

Six issues have been presented by appellant for our consideration:

> I. Whether the trial court erred in its post-trial denial of arrest of judgment and/or the granting of a new trial based upon insufficient evidence as a matter of law to sustain a conviction of first degree murder.
>
> II. Whether the trial court erred in its post-trial denial of the appellant's motion for new trial, based upon the District Attorney's closing remarks in which he injected prejudicial facts not in evidence at trial.
>
> III. Whether the trial court erred in allowing only a portion of the direct testimony of the Commonwealth's witness, Karen Antonelli, to be read to the jury without the accompanying cross-examination, thereby placing "undue emphasis" upon a particularly prejudicial portion of testimony, namely grand jury testimony.
>
> IV. Whether the trial court erred in its post-trial denial of the appellant's motion for a new trial based upon specific instances of outrageous prosecutorial misconduct committed during the District Attorney's closing argument, which served to inflame the jury and prejudice the appellant.
>
> V. Whether the trial court erred in refusing to order the District Attorney to turn over to defense counsel the notes of testimony from the grand jury of witnesses to the incident, not called by the Commonwealth, but which may have been exculpatory in nature.
>
> VI. Whether the trial court erred in permitting the District Attorney, over objection of

> defense counsel, to elicit testimony from the Commonwealth's own witness as to the bad character of the defendant, thereby prejudicing the appellant to the jury.

We have fully reviewed appellant's contentions and find them to be without merit. Consequently, we affirm the judgment of sentence entered below.

Appellant first alleges that the evidence presented by the Commonwealth was insufficient to sustain a conviction for first-degree murder. He claims the evidence was unreliable, contradictory, and falls short of proving that appellant shot Ragno. We disagree.

When assessing the sufficiency of evidence to support a conviction we must accept as true all evidence, and reasonable inferences there from, upon which the fact-finder could have based its verdict and then ask whether that evidence, viewed in a light most favorable to the Commonwealth as the verdict winner, is sufficient to prove guilt beyond a reasonable doubt. *Commonwealth v. Crawford*, 334 Pa. Super. 630, 483 A.2d 916 (1984). Using this standard, our review of the evidence in the instant case leads us to conclude that it was sufficient to sustain a conviction of first-degree murder.

The testimony of four prosecution witnesses gave the jurors the sequence of events that occurred at the night-club, starting with the argument between appellant and the victim. One witness, Susan Murray, testified that she heard a loud noise and saw a flash coming from appellant's raised hand as he stood in front of the victim. The evidence presented and the reasonable inferences which the jurors might make based on said evidence support the conclusion that appellant shot Michael Ragno. This is

enough for a murder conviction. First degree murder applies to an intentional killing. As the trial court points out, the specific intent to kill may be inferred by one's conduct, such as the intentional use of a deadly weapon on a vital part of the body of another person. *Commonwealth v. Green*, 493 Pa. 409, 426 A.2d 614 (1981). When the jury concluded, as it reasonably might based on the evidence, that appellant intentionally fired a gun and shot the victim in the head, that conclusion was sufficient to support a conviction of first-degree murder. We do not find the Commonwealth's evidence to be unreliable or contradictory, and we find no merit to this issue.

Next, Marra claims that the prosecutor's closing argument injected prejudicial facts not presented into evidence during the course of the trial, and alleges that the court erred in denying his motion for a mistrial.

In considering this issue we note first, as the prosecutor has pointed out, that no contemporaneous objection was made to many of the remarks now cited by appellant and that some of these remarks were not challenged as being prejudicial in his post-verdict motions.[1] Having

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[1] Appellant has specifically called to our attention the following remarks of the prosecutor as being prejudicial:

(1) . . ."[defendant] knows the gun has fallen out once . . . He is ready, ladies and gentlemen of the jury, he is ready. He's used it once and if he has to use it again, he is ready."

(2) ". . . What do you think [Brian Mulholland, the doorman at Flanigan's, is] thinking about at the time? Are you going to forget what is quite likely, at least at that point in time, the last face that you are ever going to see? Because all he had to do as far as Brain Mulholland is concerned is pull the trigger and Brian is history . . . You've got the argument, and you've got just the

(Continued on following page)

examined the appellant's allegations in spite of his failure to preserve many of them, we do not find that a new trial is warranted. The grant or denial of a motion for mistrial is within the sound discretion of the trial court. *Commonwealth v. Thomas*, 346 Pa. Super. 11, 498 A.2d 1345 (1985). Even considering the sum total of the allegedly prejudicial remarks cited by appellant, we do not find that the trial court abused its discretion in denying appellant a new trial.

Another of appellant's issues alleges the statements made by the prosecutor in closing argument constitute prosecutorial misconduct and warrant the grant of a new trial. The remarks included in this issue are distinct from

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incredible circumstances of facing a person who you think might kill you, and they would have you believe that he forgot or was mistaken."

(3) "Karen Antonelli told you that, and she told you who the three were. And she told you who the shooter was."

(4) "He [the appellant] didn't have to hang around the car that's just been used in a homicide . . . "

(5) "Marra had to run, he had the gun."

(6) "Ladies and gentlemen of the jury, isn't this exactly the type of action that you would expect from somebody who has just taken part in a shooting?"

(7) "Recall Karen Antonelli's testimony when she turned reflexively in the area of that shooting. Stepped back by these three defendants. And then the expression changed: The gun came out, whose expression changed..?"

(8) ". . . Marra, DeAngelo, Diorio, the three of them, not physically touching, but stepping him back . . . And by the way, you recall Susan Murry's statement, there wasn't anybody else in that area."

those discussed *supra*.[2] Again we note that some of these remarks were not objected to at the time and some were not raised in post-trial motions. However, we shall consider all the comments cited in evaluating this claim.

Our supreme court has held that, even where a prosecutor has made comments that might be judged inappropriate, a new trial will not be granted unless it is inevitable that the comments prejudice the criminal defendant to such a degree that they prevent the jurors from weighing the evidence and rendering a true verdict. *Commonwealth v. Maxwell*, 505 Pa. 152, 477 A.2d 1309 (1984); *Commonwealth v. Upsher*, 497 Pa. 621, 444 A.2d 90 (1982). The comments cited by appellant, if they are at all improper or prejudicial, do not meet the standard

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[2] The following statements are cited by appellant in support of his allegation of prosecutorial misconduct:

(1) Referring to the Commonwealth's cross-examination of witnesses as a "verbal mugging".

(2) Allegations by the District Attorney that defense counsel was

(a) tugging at emotions of the jury;

(b) playing on the jurors' sympathies so they would not do their jobs;

(c) "hell bent" on getting the jurors off their oaths;

(d) attempting to arouse jurors' sympathies by introducing the parents of co-defendant Diorio; and

(e) trying to divert the jury from the evidence.

(3) A statement that the deceased has a "right to have his killers brought to justice".

(4) A statement questioning the credibility of Commonwealth witness Karen Antonelli.

(5) A series of statements in which the prosecutor allegedly indicated that the only way the "system" will work is for the jurors to return guilty verdicts against appellant and his co-defendants.

handed down in *Maxwell* so as to necessitate a new trial. Even the sum affect of these comments would not, in our view, result in inevitable prejudice to appellant and prevent the jurors from reaching a fair verdict. This issue is without merit.

Marra alleges that the trial erred when it allowed only a portion of the testimony of Karen Antonelli, rather than her entire testimony, to be read in response to a request from the jury. The appellant argues that the court's refusal to read the full testimony of the witness placed undue emphasis on the portion which was read and thereby prejudiced him. We have addressed this subject in *Commonwealth v. Bell*, stating:

> When a jury requests that recorded testimony be read to it to refresh its memory, it rests within the trial court's discretion to grant or deny such request. . . . The parameters concerning the extent that testimony should be read to the jury are to be set by the juror's request. Hence the court, if it deems it appropriate, may permit the jury to hear only a portion of a witness' testimony.

328 Pa. Super. 35, 54, 476 A.2d 439, 449 (1984) [citations omitted]. This is a matter within the discretion of the trial court. a review of the discussion between the court and counsel concerning this matter (reproduced record, pp. 821a-849a), while somewhat confusing, does not convince us that the trial court abused its discretion in reading only a portion of Antonelli's testimony to the jurors.

Furthermore, appellant's counsel himself suggested that the court, in responding to the inquiry, communicate to the jurors that it would read to them "her [Antonelli's] testimony or any portions thereof that you want . . . "

(reproduced record, p. 822a). Therefore, appellant has no grounds on which to base a complaint.

Next, appellant contends that the testimony of Susan Murray, a Commonwealth witness, included a statement which amounts to introducing evidence of bad reputation or other criminal conduct of appellant. We disagree.

Murray had originally told the police that she had not witnessed the shooting. She later told *police, and testified* at trial, that she saw appellant raise and fire a gun at the victim. Defense counsel used Murray's previous statement to the police during cross-examination in an attempt to impeach her credibility. On redirect she explained that her reason for not telling the truth to the police at first was "because of what I heard bout the people that were involved." (reproduced record, p. 209a). Appellant's counsel then moved for a mistrial, which was denied by the court. It is clear that the prosecutor was trying to rehabilitate Murray's credibility by offering an explanation of her earlier refusal to tell the police what she had seen.

The courts of this Commonwealth have long held that a witness confronted with conflicting or inconsistent statements is entitled to the opportunity to explain or reconcile the statements, if possible. *Commonwealth v. Jordan*, 333 Pa. Super. 291, 482 A.2d 573 (1984); *Commonwealth v. Bartell*, 184 Pa. Super. 528, 136 A2d 166 (1957). Susan Murray's testimony on redirect explained her reasoning for not being forthright with the police initially. She was not specifically commenting on appellant's reputation or accusing him of being involved in prior criminal conduct. Contrary to appellant's assertions, there was nothing in her redirect testimony which would unfairly prejudice or inflame the jury.

Finally, we turn to appellant's issue regarding the Commonwealth's duty to provide him with all exculpatory evidence obtained from testimony by various witnesses before a grand jury concerning the instant case. Appellant states that all parties in this case agreed to have the trial court review the grand jury testimony and present all exculpatory material to the defense. Appellant asks us to review and verify the findings of the trial court in this regard.

In raising this issue, appellant directs our attention to only one case, *Brady v. Maryland*, 373 U.S. 83 (1963), which holds that the prosecution has the burden of providing a criminal defendant with all exculpatory evidence which establishes or tends to establish his innocence of any charges brought against him. However, appellant does not argue that the actions of the prosecutor in this case have violated the ruling in *Brady*, and we do not see how it applies to the question before us. Nor does appellant argue that the trial court's handling of this matter was improper. We note that the procedure employed by the lower court was in accordance with Pennsylvania Rule of Criminal Procedure 263, which provides for disclosure of testimony before an investigating grand jury to the parties in a criminal proceeding, and with our ruling in *Commonwealth v. Kelly*, 245 Pa. Super. 351, 369 A.2d 438 (1976), *affirmed*, 484 Pa. 527, 399 A.2d 1061 (1979).

We further note that the record in this case does not contain a transcript, sealed or otherwise, of the grand jury testimony. Under these circumstances, we do not believe that appellant has provided any basis on which we might review the actions of the trial judge in this regard.

Having found no error committed below, we affirm the judgment of sentence.

J-S43011/93

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RICHARD J. MARRA, Appellant	:	NO. 03551 PHILADELPHIA, 1992

Appeal from the PCRA Order in the Court of Common Pleas of Philadelphia County, Criminal Division, No. 86-07-2576, 2577

(Filed Nov. 15, 1993)

BEFORE: CIRILLO, TAMILIA and MONTGOMERY, JJ.

MEMORANDUM:

Richard J. Marra appeals from the October 8, 1992 Order denying his petition for post-conviction relief, filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546.

On September 29, 1987, appellant was convicted by a jury of first degree murder and possession of an instrument of crime in the 1986 shooting death of Michael Ragno in a Philadelphia nightclub.[1] Appellant's December 22, 1987 life sentence plus two and one-half (2-1/2) to five (5) year judgment of sentence was affirmed by this Court on May 26, 1989. *Commonwealth v. Marra*, ___ Pa. Super. ___, 563 A.2d 192 (1989). Appellant's petition for allowance of appeal was denied December 20, 1989 and, on

[1] Appellant's two co-defendants, Louis DeAngelo and Jeffrey DiOrio, were acquitted on all charges.

March 19, 1991, he filed a PCRA petition alleging ineffective assistance of trial and appellate counsel. After numerous hearings, relief was denied and this appeal followed.

Appellant argues trial counsel was ineffective for failing to call friends, family and neighbors to testify as to his reputation as a peaceful, law-abiding citizen. He also alleges allocatur counsel was ineffective for failing to raise trial counsel's alleged ineffectiveness as it pertains to this issue.

To prevail on a claim of ineffective assistance of counsel an appellant must establish his underlying claim is of arguable merit, counsel's course of action had no reasonable basis to effectuate his interests and he was prejudiced by counsel's action or inaction. *Commonwealth v. Williams*, ___ Pa. ___, 615 A.2d 716 (1992); *Commonwealth v. Glover*, ___ Pa. Super. ___, 619 A.2d 1357 (1993). Even if counsel is found ineffective, relief is mandated only where there is a reasonable possibility that the result would have been different had it not been for counsel's error(s). *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987).

At the close of the Commonwealth's case, trial counsel Robert F. Simone and counsel for the two other co-defendants, believing the Commonwealth had not met its burden, made the strategic trial decision to not present a defense. The strategy proved fortunate for the co-defendants but unfortunate for the appellant. Although at the March 25, 1992 PCRA hearing counsel could not recall his reasons for not calling character witnesses at the 1987 trial or whether he had discussed character evidence with the appellant, the appellant did remember discussing the issue with Simone on three occasions (N.T., 3/25/92, pp.

65-66). The record, coupled with the appellant's recollection of the aforementioned instances at which character testimony was discussed, establish Attorney Simone did not omit reputation evidence out of neglect or ignorance, but at that time made a strategic decision, in light of the Commonwealth's case, to forego such testimony. His decision is not a legitimate ground for a claim of ineffective assistance of trial counsel. Having found this first ineffectiveness allegation devoid of merit, appellant's challenge to allocatur counsel's strategy must likewise fail.

Keeping in mind the aforementioned standard of review for challenges to counsel's effectiveness, we now address whether trial counsel was ineffective for failing to introduce evidence in his possession which would have furthered the appellant's defense and raised a reasonable doubt as to his guilt. In particular, appellant contends during discovery counsel became aware that two other individuals, co-defendant Jeffrey DiOrio and acquaintance Philip Narducci, had admitted killing Ragno, yet failed to introduce the statements of three witnesses to this effect. The allegedly inculpatory statements were made during a confrontation in an Atlantic City casino between William Rogers, a friend of the deceased, and two antagonists, co-defendant DiOrio and Philip Narducci, an acquaintance of the co-defendants. Witnesses to this altercation included New Jersey Trooper Louis Onorato and Philadelphia Police Officer Konrad George, friends of Rogers, and according to their hearsay statements, after a shoving match Narducci stated, "If you are a betting man, you can bet that Bill [Rogers] won't last the week. . . . You guys don't know who I am, but you'll find out. Mike Ragno found out." (Appellant's brief at pp. 37-38.) Whereupon,

co-defendant DiOrio supposedly added, "I am going to kill you like we[2] killed Mike Ragno." (*Id.*, p. 38.)

Explaining why he didn't cross-examine William Rogers about the Atlantic City incident, Attorney Simone stated, "I though [sic] if it would hurt Jeffrey DiOrio there would be a spillover effect [to the appellant]." (N.T., 3/17/92, p. 17.) Moreover, as pointed out by the Commonwealth, " . . . none of the alleged statements [by Narducci] admitted a crime in general or responsibility for the victim's death in particular. Narducci's alleged statements showed ill-will towards Ragno, even glee at his death, but did not admit his murder." (Commonwealth's brief at p. 24.) Accordingly, the statements were inadmissible. *See Commonwealth v. Bracero*, 325 Pa. Super. 494, 473 A.2d 176 (1984). Narducci's alleged statements, even if construed as admissions, did not exonerate defendant, but merely served to implicate Narducci.

Likewise, DiOrio's hearsay threat was inadmissible as he was not a party opponent to the appellant nor was he unavailable. Further, because DiOrio was a co-defendant in a case in which the Commonwealth had charged conspiracy, his statement " . . . like I killed Ragno" would not have exonerated defendant. Setting aside for the moment any hearsay arguments for excluding statements by witnesses to DiOrio's alleged outburst, Attorney Simone testified he chose to not introduce DiOrio's statement

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[2] There is a discrepancy whether DiOria [sic] stated "like I killed Ragno" or "like we killed Ragno," either version of the statement carrying dire consequences for the co-defendants who were also charged with conspiracy.

"we"[3] killed the victim because it could have just as easily have been construed to refer to the men on trial as to he [sic] and Narducci.

For all of these reasons we agree with the PCRA court's ruling that Attorney Simone's tactical decision to exclude testimony concerning threatening and inculpatory statements by Narducci and DiOrio is not a sound basis for an ineffectiveness claim.

Appellant also argues counsel erred by failing to impeach Commonwealth witness Karen Antonelli by introducing a prior inconsistent statement made by her during the grand jury investigation. In her statement before the grand jury Antonelli testified that shortly before the shooting she was speaking with someone named Ronald Fante, while at trial she testified she was conversing with Philip Narducci, whom the defense had suggested was the real killer. Appellant contends these statements are inconsistent and should have been used to impeach Antonelli's credibility.

Logic tells us Antonelli's statements are neither mutually exclusive nor inconsistent and, therefore, they could not be used effectively to impeach her credibility. Each statement avers a fact the other does not, but neither statement contradicts the other. Because any attempt to impeach Antonelli on this basis would have failed, appellant's underlying claim is without merit and his ineffectiveness claim must fail.

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[3] *See* footnote 2.

Appellant's final challenge to trial counsel's adequacy alleges Simone was ineffective for failing to introduce a videotape, routinely made by the club in which Ragno was killed, filming the entrance to the nightclub on the night of the murder. A portion of the tape was shown to the jurors showing the appellant leaving the club immediately after originally confronting the victim and later re-entering the club. Appellant argues had the jury viewed the entire tape, which included footage establishing Narducci had left the club and returned with co-defendant DiOrio, the Commonwealth's argument appellant had left the club angry and returned later with a gun would have been dispelled.

The film, in its entirety, although not shown during the PCRA proceedings, is purported merely to have shown patrons entering and leaving the bar during the course of the evening. It did not contradict the Commonwealth's case. We are at a loss to determine how the showing of the entire video would have exonerated appellant. Moreover, whether Narducci entered the bar at the same time as DiOrio is irrelevant. It may have been coincidence, it most assuredly is not a basis upon which to theorize DiOrio conspired with Narducci to kill Ragno. We find trial counsel's decision to present no defense, including the tape in question, was a reasonable, tactical decision not subject to an attack alleging ineffectiveness.

Having found each of appellant's claims devoid of merit, we affirm the Order denying PCRA relief.

Order affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2737

RICHARD J. MARRA,
Appellant

v.

DAVID LARKINS, Superintendent, Dallas SCI;
DISTRICT ATTORNEY FOR THE PHILADELPHIA
COUNTY; THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 96-cv-02375
District Judge: The Honorable Louis H. Pollak

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES, *Circuit Judges*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

DATED: JUN 25 2002

ch/cc: PG
TWD
DCG